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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 14

MORRIS SCHOENTHAL AND FANNIE R. SCHOENTHAL, PETITIONERS,

vs.

IRVING TRUST CO., AS TRUSTEE IN BANKRUPTCY OF LEONARD H. SMITH, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 5, 1932

CERTIORARI GRANTED APRIL 11, 1932

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(36,581)

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Morris Schoenthal and Fannie R. Schoenthal,
Appellants,

against

Irving Trust Co., as Trustee in Bankruptcy of Leonard H. Smith, Trading as Faultless Sweater Mills, Bankrupt, Appellee, and Hyman Smith, Defendant.

Petition for Appeal and Order Allowing Same

The above named appellants conceiving themselves aggrieved by the judgment entered in the office of the Clerk of the United States District Court, for the Southern District of New York, on the 3rd day of March, 1931, directing judgment in favor of the appellee against the appellant Morris Schoenthal in the sum of $538.74 and against the appellant Fannie R. Schoenthal in the sum of $1,075.84, do hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors filed herewith, and the said petitioners further pray that their appeal may be allowed, and that a transcript of the record and proceedings and the papers upon which said judgment was entered duly authenticated may be sent to the United States Circuit Court of Appeals, for the Second Circuit, and that said appeal shall operate as a supersedeas, and that an order be made herein fixing the amount of security [fol. 2] to be furnished by the appellants at the sum of $2,000.00, and that upon the filing of a bond for the said sum, all further proceedings in this Court shall be stayed until the filing of the judgment and order of the United States Circuit Court of Appeals, for the Second Circuit.

Dated New York, March 18th, 1931.

Yours, &c., Martin Perlmutter, Attorney and Solicitor for Appellants, 305 Broadway, Manhattan Borough, New York City.

The above entitled petition for leave having been duly filed, it is

Ordered that the appeal be allowed as prayed for, and that upon the filing by the said appellants of a Surety Company bond in the sum of $2,000.00, with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the judgment mentioned in said petition, and entered in this action, and shall suspend and stay all further proceedings in this Court until the filing of the judgment of the United States Circuit Court of Appeals, for the Second Circuit, and it is

Further ordered that the term of this Court be and it is extended until such date as the judgment of the United States Circuit Court of Appeals, for the Second Circuit shall be filed in this Court.

Dated New York, March 23rd, 1931.

Frank J. Coleman, District Judge.

[fol. 3] IN UNITED STATES DISTRICT COURT

SUBPŒNA

The President of the United States of America to Morris Schoenthal, Fannie R. Schoenthal, and Hyman Smith, Greetings:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in equity, by Irving Trust Company, as Trustee in Bankruptcy of Leonard H. Smith, trading as Faultless Sweater Mills, Bankrupt, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you of Two hundred and fifty Dollars ($250).

Witness, Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, on the 22nd day of September in the year One thousand nine hundred and thirty and of the Independence of the United States the One hundred and fifty-fifth.

Charles Weiser, Clerk. Krause & Hirsch, Sol'rs.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office on or before

the twentieth day after service hereof excluding the day of said service, otherwise the bill aforesaid may be taken Pro Confesso.

Charles Weiser, Clerk.

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Leonard H. Smith, Trading as Faultless Sweater Mills Bankrupt, Plaintiff,

against

MORRIS SCHOENTHAL, FANNIE R. SCHOENTHAL, and HYMAN SMITH, Defendants

BILL OF COMPLAINT

Plaintiff, above named, complaining of the defendants above named, by its attorneys, Krause & Hirsch, respectfully shows to this Court and alleges upon information and belief:

For a first cause of action against Morris Schoenthal:

First. That this is a suit in equity, brought by the plaintiff, as Trustee in Bankruptcy of Leonard H. Smith, trading as Fautless Sweater Mills, bankrupt, under and by virtue of the provisions of the Bankruptcy Act of 1898, and the amendments thereto, to recover a preference under §60b of the said Act.

Second. That on or about the 10th day of July, 1930, an involuntary petition in bankruptcy was duly filed by three creditors of the bankrupt herein in the United States [fol. 5] District Court, for the Southern District of New York, praying that he be adjudicated a bankrupt, and that thereafter in the said proceeding, on the 23rd day of July, 1930, an order was duly made in the said Court, adjudicating the said Leonard H. Smith, trading as Faultless Sweater Mills, a bankrupt.

Third. That at all the times hereinafter mentioned, the plaintiff, Irving Trust Company, was a domestic corporation, organized and existing under and by virtue of the

laws of the State of New York, engaged in the banking and trust business.

Fourth. That at a first meeting of creditors of the said Leonard H. Smith, trading as Faultless Sweater Mills, duly held on the 5th day of September, 1930, before Hon. Harold P. Coffin, Referee in Bankruptcy, in charge of said proceeding, the plaintiff was duly elected Trustee in Bankruptcy of the said bankrupt estate, and that plaintiff duly qualified thereafter and has continued to act and is now acting as such Trustee.

Fifth. That within four months prior to the date of the filing of the said involuntary petition in bankruptcy, while insolvent and indebted to the defendant and divers other creditors of the same class, upon unsecured indebtedness, provable in bankruptcy, and well knowing such insolvency, the said bankrupt did, within four months prior, as aforesaid, and on or about the 9th day of June, 1930, make a transfer of his property to the defendant Morris Schoenthal by paying to him the sum of $500.00.

Sixth. That the effect of the said payment by the said bankrupt to the said defendant was to enable the said de-
[fol. 6] fendant to obtain a greater percentage of his debt than any other creditor of the said bankrupt of the same class as defendant and that the said payment did thus operate as a preference under the provisions of the Bankruptcy Act of 1898 and the amendments thereto.

Seventh. That the said defendant received the said payment knowing or having reasonable cause to believe that he was receiving a preference in violation of the provisions of the Bankruptcy Act.

Eighth. That the plaintiff has insufficient assets in its hands to pay for the debts of the said bankrupt.

Ninth. That the plaintiff has duly demanded of the said defendant the restoration and return of the said preferential payment, but that said payment has been refused.

Tenth. That the plaintiff has no adequate remedy at law.

And for a first cause of action against Fannie R. Schoenthal:

Eleventh. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs designated

"First", "Second", "Third", "Fourth", "Sixth", "Seventh", "Eighth", "Ninth", and "Tenth" of this complaint, with the same force and effect as if set forth herein at length.

Twelfth. That within four months prior to the date of the filing of the said involuntary petition in bankruptcy, while insolvent and indebted to the defendant and divers [fol 7] other creditors of the same class, upon unsecured indebtedness, provable in bankruptcy, and well knowing such insolvency, the said bankrupt did, within four months prior, as aforesaid, and on or about and between the 11th day of June, 1930, and the 19th day of June, 1930, make a transfer of his property to the de*de*fendant Fannie R. Schoenthal, by paying to her the sum of $1,000.00.

And for a first cause of action against Hyman Smith:

Thirteenth. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs designated "First", "Second", "Third", "Fourth", "Sixth", "Seventh," "Eighth", "Ninth" and "Tenth" of this complaint with the same force and effect as if set forth herein at length.

Fourteenth. That within four months prior to the date of the filing of the said involuntary petition in bankruptcy, while insolvent and indebted to the defendant and divers other creditors of the same class, upon unsecured indebtedness, provable in bankruptcy, and well knowing such insolvency, the said bankrupt did, within four months prior, as aforesaid, and on or about and between the 24th day of June, 1930, and the 30th day of June, 1930, make a transfer of his property to the defendant Hyman Smith by paying to him the sum of $800.00.

Wherefore plaintiff demands a decree and judgment against the defendants above named declaring the transfers above set forth to be preferential and void and in violation of the provisions of the Bankruptcy Act of 1898, and the amendments thereto, and that a decree be entered [fol. 8] directing the said defendants to account to and pay over to the plaintiff herein the sums found by this Court to have been paid over in violation of the provisions of the Act above set forth, together with interest from the dates

of the said payments, and the costs and disbursements of this action, and that plaintiff have such other and further relief as to the Court may seem just and equitable, and that subpœnas issue from this Court, directed to the said defendants, commanding them on a day certain to appear and answer the complaint herein and to abide by the orders and decrees of this Court.

Krause & Hirsch, Solicitors for Plaintiff, 225 Broadway, Borough of Manhattan, City of New York.

(Verified Sept. 19, 1930.)

[fol. 9] In United States District Court

[Title omitted]

Answer of Defendant Fannie R. Schoenthal

Defendant, Fannie R. Shoenthal, sued herein as Fannie R. Schoenthal, answering the complaint herein, by Maurice Letteau, her attorney, respectfully shows to this Court and alleges:

First. Denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs marked "First," "Fourth," "Eighth" and "Tenth" of plaintiff's first cause of action against Fannie R. Schoenthal.

Second. Denies each and every allegation contained in Paragraphs marked "Sixth," "Seventh," "Ninth" and "Twelfth" of plaintiff's first cause of action against Fannie R. Schoenthal.

Wherefore defendant, Fannie R. Schoenthal, demands a decree and judgment against the plaintiff herein dismissing the complaint herein, together with costs.

Maurice Letteau, Solicitor for Defendant Fannie R. Schoenthal. Office & P. O. address: 305 Broadway, Borough of Manhattan, City of New York.

(Verified Oct. 27, 1930.)

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT MORRIS SCHOENTHAL

Defendant, Morris Shoenthal, sued herein as Morris Schoenthal, answering the complaint herein by Maurice Letteau his attorney, respectfully shows to the Court and alleges:

First. Denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs marked "First," "Fourth," "Eighth" and "Tenth" of plaintiff's first cause of action against Morris Schoenthal.

Second. Denies each and every allegation contained in Paragraphs marked "Fifth," "Sixth," "Seventh" and "Ninth" of plaintiff's first cause of action against Morris Schoenthal.

Wherefore defendant, Morris Schoenthal, demands a decree and judgment against the plaintiff herein dismissing the complaint herein, together with costs.

Maurice Letteau, Solicitor for Defendant Morris Schoenthal. Office & P. O. address: 305 Broadway, Borough of Manhattan, City of New York.

(Verified Oct. 27, 1930.)

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION SUBSTITUTING ATTORNEY

It is hereby stipulated and agreed that Martin Perlmutter, Esq., with offices at #305 Broadway, in the Borough of Manhattan, City of New York, be and he hereby is substituted as and for attorney and solicitor for the defendants Morris Schoenthal and Fannie R. Schoenthal in place and in stead of Maurice Letteau, Esq.

Dated New York, February 11th, 1931.

Maurice Letteau, Attorney for Defendants. Morris Schoenthal, Defendant in Person. Fannie R. Schoenthal, Defendant in Person.

(Duly acknowledged.)

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR JURY TRIAL

SIRS: Please take notice, that on the annexed petition of Morris Schoenthal, verified the 13th day of February, 1931, and upon the bill of complaint and answer herein and upon all the proceedings, the undersigned will move the above-named Court, at a Motion Term thereof, to be held at the Court House, in the Old Post Office Building, at room 235 thereof, on the 17th day of February, 1931, at 10:30 A. M. or as soon thereafter as counsel can be heard, for an order pursuant to Equity Rule 22 directing that the action herein be transferred from the equity side of the above-named Court to the law side of the above-named Court, and that said case herein be conducted as a common law action, and/or in the alternative, that an order be made and entered herein directing that the trial of the above-entitled action be held before a jury in the same manner as would an [fol. 13] action at common law, and that the defendants be accorded a trial of the above-entitled action by a jury in accordance with the common law, and for such other and further relief as may be just and proper in the premises.

Dated New York, February 13th, 1931.

Yours, &c., Martin Perlmutter, Attorney and Solicitor for the Defendants, 305 Broadway, Manhattan Borough, New York City.

To Krause & Hirsch, Esqs., Attorneys for Plaintiff, 225 Broadway, Manhattan Borough, New York City.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR JURY TRIAL

To the Judge of the District Court of the United States for the Southern District of New York:

The petition of Morris Schoenthal respectfully shows to this Court and alleges:

I am one of the defendants in this action and make this petition in support of an application to transfer the above-entitled action to the law side of the above-named Court, or, in the alternative for an order granting to the defendants a trial of the above-entitled action by a jury under the common law of the United States of America as guaranteed by the 7th Amendment to the Constitution of the United States.

The other defendant herein who has been served, to wit, Fannie R. Schoenthal, joins in this petition, but is unable to sign an application therefor by reason of the fact that she is now confined to her home by illness. The defendant, Hyman Smith, has not been served.

[fol. 15] The action is brought to recover two alleged preferences, one against the defendant Morris Schoenthal in the sum of $500.00, and the other against the defendant Fannie R. Schoenthal in the sum of $1,000.00 claimed to have been made by payments of monies given by the bankrupt to said defendants in payment of loans due to said defendants from the bankrupt.

The action herein is clearly nothing more than an action to recover a money judgment against Morris Schoenthal and Fannie R. Schoenthal respectively for the sums of $500.00 and $1,000.00, and the third cause of action against Hyman Smith, who has not been served, is also for the recovery of a money judgment in the sum of $800.00. Each of the causes of action herein represents a definite stated amount, for which the plaintiff has an adequate remedy at law.

The petition of the defendants herein respectfully prays that they be accorded a trial by a jury either by transferring this case to the law docket, for the trial of common law cases, or in the alternative for the impanelling of a jury on the equity side of the Court and that the trial thereupon proceed in the same manner as a common law action to recover monies would be conducted. This last suggestion is not to be deemed a waiver of the common law right to a jury trial, but is made solely in order to expedite the proceedings herein, the demand for a jury trial being made as a constitutional right under the Constitution and the Laws of Congress.

Furthermore, the petitioners respectfully state to the Court that since the plaintiff has an adequate remedy at

law, to wit, an action to recover the sum of $1,500.00, which the plaintiff claims was received by the defendants as a preference, equity should not entertain this case and under the provisions of Equity Rule 22, now Section 723 of Title [fol. 16] 28 of the United States Code Annotated, the said action should be transferred to the law side. This section provides as follows:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleading as shall be essential."

Furthermore Rule 23 provides as follows:

"Suits in Equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

The Trustee in this case has a plain, adequate and complete remedy at law, for all that he seeks is a judgment for the recovery of a stated sum of money with respect to which it is wholly unnecessary to invoke any equity jurisdiction. The result of bringing this action in equity is only to deprive defendants of their constitutional right to a jury and for that reason this case should be transferred to the law side of the Court as a common law case with a jury trial, or, in the alternative, it is suggested that a jury be impanelled in this case in order to save time, but that the action proceeded as a regular jury trial to recover a specified sum of money.

The Court is respectfully requested to grant the petition herein and to grant the defendants herein a trial by jury either by transferring the above-entitled action to the law side of the Court, or to impanel a jury for a common law trial.

Dated New York, February 11th, 1931.

Morris Schoenthal, Petitioner.

(Verified Feb. 11, 1931.)

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING DEFENDANTS' MOTION FOR JURY TRIAL

The defendants Morris Schoenthal and Fannie R. Schoenthal having duly moved the above named Court for an order transferring the above entitled action to the Law side of the Court, and granting the defendants a trial by jury, and the said motion having duly come on to be heard before a Motion Term of the above named Court, before Hon. William Bondy, and the said Hon. William Bondy having duly referred the motion to the Justice above named, and the said motion having duly come on to be argued before the above named Court prior to the trial of the above entitled action, and after reading and filing the notice of [fol. 18] motion herein dated the 13th day of February, 1931, and the petition of Morris Schoenthal, dated and sworn to the 11th day of February, 1931, with proof of service thereof, upon the attorneys for the plaintiff, and after hearing Martin Perlmutter, Esq., solicitor for the defendants, by Leo Guzik, of counsel, in support of the motion, and Krause & Hirsch, solicitors for the plaintiff, by George Levin, of counsel, in opposition thereto, and due deliberation having been had,

It is on motion of Krause & Hirsch, solicitors for the plaintiff,

Ordered that the said motion of the defendants for a trial by jury, and to transfer the case to the Law side of the Court, be and the same hereby is in all respects denied.

Denied.

J. F. S., District Judge.

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

February (1931) Term

Before Honorable John Foster Symes, District Judge

New York, February 24, 1931—3:15 P. M.

Statement of Evidence

APPEARANCES

Krause & Hirsch, Solicitors for Plaintiff; George C. Levin, Counsel.

Martin Perlmutter, Solicitor for Defendant Schoenthal; Leo Guzik, Counsel.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Guzik: May I proceed, your Honor? In my previous application for an adjournment I may not have made myself clear. The facts are these: There are two defendants against whom two separate preferences are sought to be set aside. I am ready to go to trial on one of those, the defendant is present in court; the other defendant is ill.

[fol. 20] The Court: Which one is present?

Mr. Guzik: Morris Schoenthal. I am ready now to go to trial. I can not proceed on the other. I have a doctor's affidavit that this woman, if she is subjected at the present time to court proceedings, is in danger of her life. I can not even get permission from the doctor to take her deposition. He says in a month—she is now being treated—she may be able in a month to have her deposition taken. I have the doctor's affidavit, which I previously submitted to your Honor.

Mr. Levin: If your Honor please, I would be the last one to want to jeopardize the woman's life for a fifteen hundred dollar claim; I, on the other hand, do not want to go ahead on the matter piecemeal. The trustee asks for a recovery of $500.00 against this defendant; we seek a thousand dollars from the defendant who is ill; as against another we find the defendant is out of the jurisdiction be-

cause we can not effect service; there is another recovery of $800.00, although that matter is not in issue because we have not effected service.

Now, the defendants in this case knew right along, and previous to this, that the woman was precariously ill and they should have made some effort to bring her testimony before the Court. I will say this to the Court: that sometime ago, during a Twenty-One A examination I endeavored to effect service upon this woman at her home address and I was told it was impossible to do so—I do not know whether it was on account of illness or some other reason. I am going to leave it to the Court and make no recommendation whatever.

I submit these facts to the Court: We are compelled to rely in these cases upon hostile witnesses and we have been met at point of trial with a motion to adjourn the action [fol. 21] and a transfer from the equity calendar to the law side. Now, there is a question of good faith, here, whether all these tactics are being adopted for the purpose of delay or actually for the purpose which the application recites.

I will say this to the Court: If this defendant is, in good faith, making this application, let him stipulate that I may use the bankrupt's testimony without calling him, without the necessity of finding him on the adjourned date. On that stipulation I will consent to this adjournment.

Mr. Guzik: No objection.

The Court: You consent but there is nothing before the Court. I would like to have a record made of the concession.

Mr. Guzik: I am perfectly willing to concede, your Honor, that we can go to trial.

Mr. Levin: I do not want to try this case piecemeal. I do not really understand the concession.

Mr. Guzik: I am perfectly willing, your Honor, to take all the testimony today, take it before your Honor, and have the case continued and then we can get this woman to court. I have no objection to that.

Mr. Levin: We have a visiting judge. We have no statement when this witness is expected to recover or when it can reasonably be anticipated she will be examined. Furthermore, there is no suggestion made of the testimony.

Mr. Guzik: If we go to trial on this preference of Morris Schoenthal——

Mr. Levin: I refuse.

Mr. Guzik: Pardon me. If I be allowed to examine the [fol. 22] bankrupt as to what transactions including the transactions with the other defendant, then his testimony can be used at the second trial. That is the stipulation you requested. I am perfectly willing to have this bankrupt's testimony used on the second trial without my privilege of cross examination.

The Court: I do not think this affidavit of the doctor is sufficient.

Mr. Guzik: We will have the doctor appear.

The Court: No; that is up to you to produce proof. And even if it were sufficient, counsel has not shown proper diligence in getting this woman's testimony or her deposition. I can not help be impressed but there is a very studied effort being made here to postpone the case. However, as long as the trustee does not insist on going ahead it will be postponed upon such terms as he names.

Mr. Guzik: Your Honor, may I say this?

The Court: I have decided the matter.

Mr. Levin: I will consent to an adjournment on condition that counsel will allow me to read in the record, without producing the bankrupt and giving him the privilege of calling, if he so requires, the testimony of the bankrupt Leonard H. Smith, taken before Honorable Harold P. Coffin, sitting as Special Commissioner, on July 31st, 1930.

Mr. Guzik: Your Honor, I have never spoken to this bankrupt. I wasn' present——

Mr. Levin: You have read the testimony.

The Court: You go to trial on both cases.

Mr. Guzik: May I say this about any studied attempts to delay, if your Honor will examine the Law Journal for Saturday, I was marked as counsel in a case on trial. I am allowing someone else to cross examine in that case for fear [fol. 23] I would be charged with delaying, not coming from that court where I was actually a witness a few minutes ago, so I think your Honor is mistaken, I respectfully submit, mistaken that I made any attempt to studiously delay the case.

The Court: I am speaking of the parties to the case. I am not speaking personally of counsel. That is the impression I have gained from having heard two or three different motions, at various times, since I have been sitting in this

court, all of them with the idea of postponing the final hearing on this action. Counsel must realize a bankruptcy preference suit, like these are, involves a preference and counsel should guide themselves accordingly.

Mr. Guzik: Your Honor, I have another motion here referred to you by Judge Bondy.

The Court: What is that?

Mr. Guzik: A motion for a jury trial, in which Judge Bondy said if the trial was not before your Honor on this calendar, he would take it up with the Circuit Judges of this Court. He read our brief on the call of the calendar. I have the briefs and motion papers here. I would like to be allowed to argue that motion now.

The Court: What did Judge Bondy decide to do?

Mr. Guzik: He referred it to you.

(Argument on the motion off the record.)

The Court: Motion denied. You may have your exception.

Mr. Guzik: The other defendant in this case is willing to defray the expenses of any physician in court.

The Court: It is too late.

Mr. Guzik: May I then move to separate the cases? I do [fol. 24] not see how they can be tried together. I move to sever the actions on the ground that there is an improper joinder; on the ground that two distinct preferences have been joined in one action; an improper joiner of causes of action and parties.

Mr. Levin: With respect to that, it has all the vices of the other motions made here today.

(Argument off the record.)

The Court: Motion denied.

Mr. Guzik: I respectfully except. Your Honor, may I now make a formal motion for adjournment of the preference action of this defendant, who is ill? Irespectfully move that these actions be severed and the trial adjourned as to the defendant, Fannie, on the ground that the said defendant is ill and cannot attend at court; on the further ground that the defendant hereby offers to have the said defendant examined by any physician designated by the Court, at the expense of said defendant, in order to ascertain the true condition of said defendant; and that defendant is willing to have the examination made at once in order to ascertain

whether the trial can proceed as to that defendant by tomorrow morning.

The Court: I do not think it is made in good faith. The affidavit of the doctor presented here is not sufficient. The Court concludes there has been no effort made to take a deposition or in any way meet the rule, this being a preference case, it is the duty of counsel to aid the Court in deciding these matters as promptly as possible. It is very clear in the opinion of the Court that all that is suggested here is delay and that if this defendant is not able to attend court the deposition should be taken or could have been taken either now or sometime since that fact became known to counsel. Motion is denied.

[fol. 25] Mr. Guzik: I respectfully except.

The Court: This case will proceed and the other matter will go over until tomorrow morning.

Mr. Guzik: May I ask your Honor to direct that the motion papers be made a part of the record?

The Court: Yes.

(Mr. Levin made an opening statement to the Court.)

(Mr. Guzik made an opening statement to the Court.)

Mr. Levin: There is no question but that these people made, in fact, loans to the company and the money was used in the business. I offer in evidence a certified copy of order approving trustee's bond.

Mr. Guzik: No objection.

(Marked Plaintiff's Exhibit 1.)

Mr. Levin: I offer in evidence from the files of this Court, produced from the office of——

Mr. Guzik: We may save some time if he will give the dates of adjudications, and I will concede that on such and such a date a petition was filed. We can save time.

The Court: Petition was filed on the 10th of July?

Mr. Guzik: I will concede that it is involuntary.

Mr. Levin: That is admitted by your answer.

Mr. Guzik: There is no use in offering — in evidence. I will admit that.

Mr. Levin: That is what I meant. I will offer in evidence from the files of this Court, produced from the office of Honorable Harold P. Coffin, Referee in Bankruptcy, in charge of this matter, the following documents, and since

[fol. 26] they are court originals, ask that they be deemed marked as exhibits: the trustee's first report of the Irving Trust Company, filed on September 23rd, 1930, indicating that the trustee has a balance on hand to the credit of the estate, in the bank of $5,097.10.

(Deemed marked in evidence as Plaintiff's Exhibit No. 2.)

Mr. Guzik: No objection.

Mr. Levin: I offer in evidence from the same file order of the Referee in Bankruptcy declaring first dividend of ten per cent, dated September 24, 1930.

Mr. Guzik: I object to that as incompetent, irrelevant and immaterial.

Mr. Levin: We have to show the estate cannot pay a hundred cents on the dollar.

Mr. Guzik: I will admit that. Without saying whether it is true or not, I will admit that.

(Deemed marked Plaintiff's Exhibit No. 3.)

Mr. Guzik: I object.

The Court: He has a right to put it in if he wants.

Mr. Guzik: Then I will withdraw my admission.

Mr. Levin: I will offer in evidence from the same file the schedules in bankruptcy of the bankrupt and ask that they be deemed marked in evidence.

Mr. Guzik: I object to it, as incompetent, irrelevant and immaterial and not binding on these defendants.

The Court: It will be admitted.

(Deemed marked Plaintiff's Exhibit No. 4.)

Mr. Guzik: I respectfully except.

Mr. Levin: Mr. Smith, please take the witness stand.

[fol. 27] Leonard H. Smith, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Levin:

Q. 1. Where do you live, Mr. Smith?

A. 17971 Grand Concourse.

Q. 2. You are the bankrupt in this case?
A. Yes.
Q. 3. Under what name did you do business?
A. Faultless Sweater Mills.
Q. 4. At what address?
A. 105 Wooster Street, New York.
Q. 5. New York City?
A. New York City.
Q. 6. In what line of business were you engaged?
A. Manufacturing sweaters.
Q. 7. No one else connected in the business with you?
A. No.
Q. 8. Is the defendant Morris Schoenthal related to you?
A. Yes.
Q. 9. What is the relationship?
A. He is a cousin.
Q. 10. Is the defendant Fannie R. Schoenthal related to you?
A. Same way.
Q. 11. What relationship is Hyman Smith to you?
A. My brother.
Q. 12. How long have you been in business,
A. Under this address?
Q. 13. Yes.
A. Ten years.
Q. 14. Throughout that time you have conducted the business yourself?
A. Yes, sir.
Q. 15. I assume that in the conduct of your business you carried a stock of merchandise and machinery and equipment?
A. Yes, sir.
Q. 16. I call your attention to the fact that the petition in bankruptcy in this case was filed July 10, 1930. Will [fol. 28] you please tell us for six months prior to that time how business had been getting on?

Mr. Guzik: I object to it as calling for a conclusion. The question is rather indefinite, how business was getting along. I don't know what he means, whether business is getting good or bad.

Q. 16. (Continued.) Was it good or bad?

Mr. Guzik: I object. It is a concept, business being good or bad, and the question is too indefinite.

The Court: I understand it is just a preliminary question and will probably be developed.

The Wtiness: Can I answer?

The Court: Yes.

A. Business was the same as with everybody in a general way.

Q. 17. Would you describe it as good or bad?

A. Well, not bad and not good.

Q. 18. From the beginning of 1930 your business had considerable net worth, is that not right?

A. I do not understand what you mean.

Q. 19. Do you know what I mean by net worth?

A. Do you mean it was worth more than I owed? Yes.

The Court: Did your assets exceed your liabilities?

The Witness: Yes.

Q. 20. Can you tell me at the beginning of 1930 what your assets and liabilities were?

A. I couldn't recollect that.

[fol. 29] Q. 21. I show you this paper and ask you to please state to the Court, if you know, what it is?

A. That is a statement of assets and liabilities, December 31st, 1928.

Q. 22. This statement is signed by whom?

A. By myself.

Q. 23. Now, at the date of this statement, will you please state to the Court what your net worth was?

Mr. Guzik: I object to that on the ground that it was 1928.

Mr. Levin: Subject to connection.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

A. My worth was $29,636.96.

Q. 24. After this statement which you have just referred to, did you issue any further financial statements?

A. No, sir.

Q. 25. Would you say that your financial condition, and I refer to that of your business, in June, 1930, was better or worse than the condition reflected by this financial statement?

Mr. Guzik: I object to it, as improper.

The Court: Objection overruled.
Mr. Guzik: I respectfully except.

(Q. 25 repeated.)

A. I really didn't know. I didn't take no inventory. I don't know how I stood. I thought business was all right.
Q. 26. Do you want this court to believe that you do not know how your business stood in June, 1930?
A. I didn't know exactly how I stand.
Q. 27. You mean that you do not remember about it?
[fol. 30] A. No, I did not know at that time.
Q. 28. Are you certain about that?
A. Positively.
Q. 29. Do you remember being examined before the Referee in Bankruptcy by me?
A. Yes.
Q. 30. Do you remember me putting to you certain questions and you making certain answers?
A. Yes.
Q. 31. Do you remember whether there was any change in market conditions during 1930?

Mr. Guzik: I object to it as incompetent, irrelevant and immaterial.
The Court: Overruled.
Mr. Guzik: I respectfully except.

A. I don't remember that now.
Q. 32. You do not remember that now?
A. No.
Q. 33. See if I can refresh your recollection, reading from the examination of the witness before Referee Coffin, on July 31st, 1930:

"Q. According to this statement on December 31st, 1928, you had a net worth of $29,636.96?
"A. Yes.
"Q. Where my finger is——"

Mr. Guzik: May I interrupt? Is this being read for the record or for what purpose?
Mr. Levin: For the purpose of refreshing the witness's recollection.

Q. 33. (Continuing:)
"Q. Where my finger is (indicating)?

"A. Whatever this statement says is correct.

"Q. What happened to that net worth?

"A. There are books for that. The books will explain everything.

[fol. 31] "Q. You explain to me what happened to it in a general way.

"A. There was a decline in stock. The price of stock came down and the price of machinery came down and there was a loss in manufacturing.

"Q. What percentage drop was there in price?"

Mr. Guzik: I object to the reading of all the testimony into the record. He has not testified whether he remembered or whether he was asked these questions.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

Q. 33. (Continuing:)

"A. I couldn't tell exactly.

"Q. Have you any idea?

"A. No, my accountant could explain this matter better than I can do.

"Q. What specific merchandise dropped, in price?

"A. Everything, raw material and finished.

"Q. What do you refer to by drop in machinery, you mean depreciation?

"A. Depreciation, that you have to go and buy new machinery, and the old machinery wasn't worth anything and you paid a lot of money for that machinery."

Do you remember being asked those questions and giving those replies?

Mr. Guzik: I object to that. I will withdraw the objection.

A. I couldn't remember that.

Q. 34. Do you remember my asking you those questions and you making those replies to those questions?

A. I don't remember that. I am telling you I cannot remember what it was at that time.

Q. 35. Do you deny making those answers?

A. I don't deny, but I don't remember.

[fol. 32] Q. 36. Were these answers correct?

A. I wouldn't tell you now.

Q. 37. Do you mean to tell this court that your inventory in June, 1930 was worth just as much as it was on the financial statement which I show you?

A. I don't say exactly. It dropped a little but it didn't drop so much.

Q. 38. How much do you say it dropped?

A. I couldn't tell you exactly; couldn't state exactly what it is.

The Court: We will adjourn until tomorrow morning.

(Adjourned to February 25, 1931; 10:30 A. M.)

New York, February 25, 1931—10:30 A. M.

Trial resumed.

LEONARD H. SMITH, resumed.

Direct examination.

By Mr. Levin (continued):

Q. 39. At the close of yesterday's hearing, Mr. Smith, we were discussing the condition of your company financially on or about June, 1930. Have you thought about that?

A. Yes.

Q. 40. Now, can you tell the Court what the condition of your company was in June, 1930?

A. Well, can you state the question definitely what you mean by what condition?

Q. 41. How did your condition compare in June, 1930?

A. The way I admitted, the price of merchandise dropped [fol. 33] a little and the price of machinery depreciated, but I was always considered solvent.

The Court: Did you consider yourself as solvent?

The Witness: I consider myself solvent.

The Court: When?

The Witness: At that time.

The Court: What date?

The Witness: In June.

Q. 42. I am asking him about June, 1930.

A. June, yes, 1930.

Q. 43. When did your accountant last examine your books?

A. That was the day before I went to the creditors.

Q. 44. I suppose that was the last time you paid your accountant?

A. Well, this I don't remember.

Q. 45. When did you go to your creditors?

A. I don't remember exactly the dates. You have the dates.

Q. 46. According to your testimony before the Referee you went to your creditors June 30, 1930, and a meeting was called on July 2nd, 1930?

A. The way I recollect I was there one day before the meeting was called.

Q. 47. See if I can refresh your recollection——

Mr. Guzik: I object to any refreshing of his recollection. He says he remembers that on that day. I object to his reading these minutes into evidence.

Q. 48. Do you remember when you went to your creditors?

Mr. Guzik: I object to that. He has answered he does remember.

[fol. 34] By the Court:

Q. 49. When did you go to your creditors?

A. Well, I went to my creditors the day before the meeting was called.

Q. 50. When was the meeting called?

A. The next day. I couldn't tell you exactly the day. But I distinctly remember that.

By Mr. Levin:

Q. 51. You went to your creditors the end of June, 1930, is that right?

A. The way I said, I can not remember exactly the dates, but I am telling you it was the day before.

The Court: Was it the latter part of June or not?

The Witness: The latter part.

The Court: If you will try to co-operate here a little

better than you have, we will save time. Do not fence with counsel. Give answers freely.

The Witness: I am trying my best to answer questions.

Q. 52. The petition in bankruptcy in this case was filed on July 10th?

A. Yes, sir.

Q. 53. Does that help you fix the day when you went to your creditors?

A. About ten days before that, about eight days.

Q. 54. Prior to your going to your creditors, when did you last pay your accountant?

A. This I can't remember.

Q. 55. You paid your accountant in June, 1930, did you not?

A. Yes.

Q. 56. What did you pay your accountant for in June, 1930?

A. For taking inventory, helping me take inventory, and [fol. 35] fixing up the report for the creditors, for preparing the report.

Q. 57. Do you remember how much you paid your accountant?

A. I think I paid him a hundred dollars.

Q. 58. What is your accountant's name?

A. Mr. Blackman.

Q. 59. Has he a firm name?

A. Blum, Blackman Company.

Q. 60. I show you this check.

A. Yes.

Q. 61. To the order of Blum, Blackman Company in the sum of $100.00, and ask you if that is the check you gave your accountant?

A. Let me see. Yes.

Mr. Levin: I offer the check in evidence.

Mr. Guzik: I object to it as incompetent, irrelevant and immaterial. I do not know the purpose for which it is offered. If I am enlightened, I may withdraw my objection.

Mr. Levin: To show the surrounding circumstances in June, 1930.

The Court: Objection overruled.

Mr. Guzik: Exception.

(Marked Plaintiff's Exhibit 5.)

Q. 62. Am I right in saying that these hundred dollars were given to your accountant for preparing a report on your financial condition in June, 1930?

A. Yes.

Q. 63. And this report that your accountant prepared disclosed what?

A. The condition of the business.

Q. 64. You were speaking a few minutes ago that you thought you were solvent.

[fol. 36] A. I thought to the last day I am solvent; before I took inventory I didn't know how I stand.

Q. 65. After you took inventory what did you find out?

A. I find out that I was considering, even that day, after I took inventory, I was solvent, and I went to the creditors and asked for extension.

Q. 66. Even though you had your accountant's report you still considered yourself solvent?

A. I considered, well, I had a big stock, big merchandise made up for the fall, and June was a slow month, and I figured even though I lost a few thousand dollars, I will make it up in the season.

Q. 67. What did your creditors say about an extension?

A. They refused that.

Q. 68. Well, did you make any offer of settlement to your creditors?

A. Yes, sir.

Q. 69. What offer of settlement did you make?

A. Twenty-five per cent.

Q. 70. In other words, you offered to pay your creditors twenty-five per cent of your indebtedness to them?

A. Yes, sir.

Q. 71. I assume you considered that a fair offer?

Mr. Guzik: I object to that, if your Honor please.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

A. I considered this offer as much as I was able—I considered I was able to raise.

Q. 72. During summer months did your company do much business?

A. Well, not much. We generally do business in the fall months.

Q. 73. In other words, in June, 1930, you were approaching a very dull season?

A. Well, in June is always slow in my trade.

[fol. 37] Q. 74. That is true also of July and August?

A. Well, August the season starts.

Q. 75. The latter part of August?

A. Well, the early part of August.

Q. 76. Is it not a fact that in June, 1930, you had very little cash on hand?

A. That is true.

Q. 77. Did you have enough cash to pay your creditors?

A. No.

Q. 78. And you also had a number of past due bills, did you not, in June, 1930?

A. Yes.

Q. 79. And is it not true that a good many of your creditors were pressing you for payment?

A. Well, some used to press*ed* me, some not.

Q. 80. In June, 1930, you were indebted to a number of your relatives for loans, is that not right?

A. Yes.

Q. 81. And you made various payments during—

A. Well, I paid before, too.

Q. 82. You made various payments to them, to your relatives, in June, 1930?

A. Yes, I paid the creditors, too.

The Court: You are not asked that. Just answer the question.

Q. 83. After you paid your accountant $100.00, did you make any payments to the defendant Morris Schoenthal?

A. Well, I couldn't recollect. If you show me a check, I can tell you.

Q. 84. I ask you what this check, dated June 9, 1930, is for?

A. That is for a loan.

Q. 85. That is a repayment?

A. Repayment on a loan.

Q. 86. Of $500.00?

A. Five hundred dollars.

Q. 87. To Morris Schoenthal?
A. Yes, sir, June 9.

The Court: When was that paid?
[fol. 38] Mr. Levin: June 9, 1930. I offer this check in evidence.
Mr. Guzik: No objection.

(Marked Plaintiff's Exhibit No. 6.)

Q. 88. I show you this check of June 11, 1930, and ask you if that represents a repayment of a loan?
A. Let me see that, please?
Q. 88. (Continuing:) To Fannie Schoenthal in the amount of $500.00?
A. Yes, sir.

Mr. Levin: I offer that check in evidence.

(Marked Plaintiff's Exhibit No. 7.)

Q. 89. I show you this check of June 19, 1930, to the order of Fannie R. Schoenthal, in the amount of $500.00, and ask you if that represents a repayment of a loan to that individual?
A. Yes, sir, repayment of a loan. It is marked on the check.

Mr. Levin: I offer that check in evidence.
Mr. Guzik: No objection.

(Marked Plaintiff's Exhibit No. 8.)

The Court: What relation is she?

Q. 90. She is a cousin, is that right?
A. Cousin.
Q. 91. What is the relationship between Morris Schoenthal and Fannie R. Schoenthal?
A. Brother and sister.
Q. 92. I show you this check of June 24, 1930, to the order of Hyman Smith in the amount of $300.00, and ask you what that represents?
A. Payment of loan, repayment of loan.
[fol. 39] Q. 93. To your brother?
A. My brother.

Mr. Levin: I offer this check in evidence.
Mr. Guzik: I move to strike out the answer, and the in-

troduction of the check, on the ground that Hyman Smith is not a defendant in this case, has not been served, and it is incompetent, irrelevant and immaterial with respect to the defendants now in suit.

Mr. Levin: I am showing that in the month of June the relatives of this bankrupt were taken care of. I admit that check is not in suit because that defendant has not been served. I submit I am entitled to give the Court the circumstances for building up the complete picture.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

(Marked Plaintiff's Exhibit No. 9.)

Q. 94. Did you make any more payments to your brother?
A. Yes.

Mr. Guzik: The same objection, your Honor.

Q. 95. I show you this memorandum, and ask you if you can tell me the date and the amount of any further payments to your brother, Hyman Smith?

Mr. Guzik: I object to it, as incompetent, irrelevant and immaterial, and not binding on the defendants.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

A. June 30th.

[fol. 40] Q. 96. 1930?

A. Yes.

Q. 97. In what amount?

A. $500.00.

Q. 98. What is that slip which you hold in your hand?

A. Well, I don't know what it is. You can explain better.

Q. 99. Is that a memorandum of the bank for a certification of a check?

A. Yes, sir.

Mr. Levin: I offer the memorandum in evidence.

Mr. Guzik: Same objection, if your Honor please, and on the further ground I do not know the relevancy of the memorandum. He has testified it was paid in that amount over my objection.

The Court: It is just cumulative. If you want to have it in, you have a right to put it in.

Mr. Guzik: I respectfully except.

Mr. Levin: Just to have the record complete, your Honor.

(Marked Plaintiff's Exhibit No. 10.)

Mr. Guzik: I respectfully except.

Q. 100. In June, 1930, what were your liabilities?

A. This I couldn't tell you. You have a record there.

Q. 101. You signed and swore to the schedules in bankruptcy in this case, did you not?

A. Yes.

Q. 102. Are your schedules correct?

A. Positively.

Q. 103. I call your attention to the fact that your schedules list liabilities totaling $18,900.26?

A. That is correct.

Q. 104. Those are your liabilities. Now, do those liabili- [fol. 41] ties include the loans to your relatives which you repaid in June, 1930?

A. I don't think so. You bad better look it over.

Q. 105. You look over the list of creditors, Mr. Smith.

A. No, they don't include.

Q. 106. Altogether, how much did those loans you repaid total, do you recall?

Mr. Guzik: I will concede whatever the amount is—twenty-three hundred dollars?

Mr. Levin: Twenty-three hundred dollars is correct. Counsel concedes that the total repayments in June to relatives were $2,300.00.

The Court: How much assets does that statement show?

Mr. Levin: The schedules in bankruptcy list assets of fifteen thousand, nine hundred fifty-three dollars and eighty-eight cents.

The Court: $2,300.00 was all paid in June?

Mr. Levin; That is right.

Q. 107. According to these schedules, your principal assets consisted of machinery and tools which are listed at $9,282.15, is that right?

A. Machinery, yes.

Q. 108. And that was most of your machinery——

A. Well, various kinds bought; some were new.

Q. 109. And that is the machinery which you referred to as having depreciated in value?

A. No, not the new ones; the old ones.

Q. 110. How much of the machinery was brand new?

A. About half of it.

Q. 111. And the rest of it was how old?

A. About three or four years old.

Q. 112. I call your attention to the fact that your assets [fol. 42] include an unliquidated claim from N. Liebowitz, of $1,001.73. Who was N. Liebowitz?

A. Salesman.

(Discussion off the record.)

The Court: Do you want to stipulate that this doctor would testify in accordance with this memorandum, if it becomes material?

Mr. Levin: I will stipulate the witness, if called, would give testimony as stated in this memorandum. I object to its materiality and so forth.

Q. 113. Does that money represent overdrawals?

A. Yes, advance on commissions.

Q. 114. Did you ever make any attempts to collect that asset?

A. Well, I tried. I left it to you to collect, and many others to collect.

Q. 115. You were not able to collect it?

A. No. I tried.

Q. 116. At the time of your proposed settlement to creditors, did you have a large bank balance?

A. No.

Q. 117. Where did you expect to get the money to effect the settlement?

A. Borrow it from friends.

Q. 118. From these same relatives?

A. No, I don't say exactly from the same relatives.

Q. 119. Why was it in June, 1930, when you had considerable past due obligations you repaid your relatives in full?

Mr. Guzik: I object to that.

A. They asked me for the money.

Mr. Guzik (continuing): It is immaterial. I will withdraw it.

[fol. 43] The Court: That last part of the question——

A. (Continuing:) They asked me for the money and I wanted to get more money from these people and they said, "Pay back whatever you owe."

Q. 120. In other words, in June, 1930, you came to these relatives and asked them for more money?

A. Yes.

Q. 121. And did they say to you they wanted to know how your business stood?

A. They didn't ask me that.

Q. 122. They did not ask you that?

A. No, they only said, "Pay back whatever you owe me."

Q. 123. Are you certain, Mr. Smith, that your relatives did not ask you how your business stood?

A. No.

Q. 124. Did you not go to your relatives and tell them you were pressed for money?

A. I didn't tell them. I told them I needed money.

Q. 125. Did they not ask you why you needed money?

A. Well, they always, when I came to them, to ask for money, they never asked why I wanted it. They say, "All right," and give it to me, all the time.

Q. 126. Whenever you wanted to get money you got it?

A. Whenever I needed money they gave it to me.

Q. 127. You needed money pretty badly in June, 1930?

A. Yes, I needed it bad.

Q. 128. And instead of getting money from your relatives you gave it to them?

Mr. Guzik: I object to it as argumentative.

[fol. 44] The Court: Strike it out. That has already been covered.

Q. 129. Did you ever talk to your relatives about your financial condition?

A. Well, they used to ask me how business is. I told them I am getting along all right.

Q. 130. Did you ever have a talk with them about whether or not you were behind in your business?

A. No, I told them I am not behind.

Q. 131. Who advised you to make an assignment, to go to your creditors?

Mr. Guzik: I object to that. There is no evidence in the record of any such request.

Mr. Levin: Withdrawn.

Q. 132. Did your relatives ever make any suggestion to you that you make an assignment for your creditors?
A. Never did.

Mr. Guzik: May I ask that when counsel says relatives, he specifically point out whom, because I do not represent one of those relatives.
The Court: Just name them.

Q. 133. Did Morris Schoenthal or Fannie Schoenthal ever say to you that you ought to have an inventory taken?
A. They never told me that.
Q. 134. You realize you are under oath?
A. Positively.
Q. 135. Do you remember testifying before the Referee in Bankruptcy?
A. Yes.
Q. 136. Do you remember what your testimony was in that respect before the Referee?
A. I certainly remember.
[fol. 45] Q. 137. See if I can refresh your recollection in that respect.

Mr. Guzik: I object to that, if your Honor please, on the ground that counsel can not impeach his own witness.
The Court: I think in a situation like this, where it is the bankrupt, you can hardly say he is his witness.
Mr. Guzik: All right, I will withdraw it.

Q. 137. (Continuing:) Reading from the testimony referred to yesterday, of this witness.

Mr. Guzik: Just a minute. Are you reading that into the record? Unless counsel wishes to ask him in the form of a question whether or not it refreshes his recollection, I object.

Q. 138. Did you or did you not testify as follows before the Referee?

Mr. Guzik: I am objecting to his attempt to impeach his own witness by a roundabout method.
The Court: Objection overruled.
Mr. Guzik: Exception.

Q. 138. (Continuing:)

"Q. How is it you happened to repay all these relatives during the month of June?

"A. I paid them before that, too.

"Q. I am talking about the June payments.

"A. I saw I am short of cash money and so I went to these people and I asked them they should loan me more [fol. 46] money. They used to help me out right along, and they told me to go and take inventory and find out how I stand and I walked out and when they found out how it was they pressed me.

"Q. You told them how the inventory stood?

"A. I told them I am pressed and I don't see any way out of it.

"Q. Then you asked for more money?

"A. They wouldn't give me. I asked for money.

"Q. Why didn't they give you more money?

"A. They saw I am behind, and I wouldn't be able to pay it.

"Q. Who saw you were behind?

"A. My people.

"Q. All these people you borrowed from?

"A. My brother didn't know anything but he came up to the business and he saw how I stand and I had to pay him off.

"Q. Hyman Smith?

"A. Hyman Smith. The other people found out."

Mr. Guzik: I move to strike it out on the ground that it refers to a defendant in the case whom I do not represent.

Mr. Levin: Suppose you let me state the testimony and then you can make any objections you wish.

Q. 138. (Continuing:) Please listen to this testimony:

"The other people found out something was wrong and they didn't want to give me any more money.

"Q. They insisted on being paid?

"A. Yes.

"Q. Did you ask them to wait?

"A. No, they didn't want to. They used to come to the house, and I had to pay.

"Q. Didn't you tell them you owed to other creditors?

"A. Yes.

[fol. 47] "Q. They insisted upon getting their money?

"A. Yes, I had to do it.

"Q. At the time you had this conversation with them you had already taken inventory and found out you were considerably behind?

"A. No, I didn't have to take any inventory yet. I was questioning. I saw at that time I was behind in ready cash, and I would not be able to get cash during the summer time because my store was always fall goods, and I would not be able to continue, and that was the reason they pressed me for money.

"Q. They realized you had no capital, and with a slack season coming?

"A. Yes.

"Q. And you say these people came to your house and insisted upon getting paid?

"A. Yes.

"Q. When was that, in June?

"A. That was before I paid them.

"Q. Shortly before?

"A. Yes, they used to come often to the house and bother me that I should give them money.

"Q. Who?

"A. Mr. Schoenthal, and Fanny Schoenthal, and my brother.

"Q. Why did they suddenly come to your house?"

The Court: I do not think it is proper to read indefinitely.

Mr. Levin: I merely want to get——

The Court: It isn't fair to read to the witness fifty or sixty questions and then ask him to testify whether he remembers them. If you want to refresh him on some particular it will be all right, but that does not give you the right to put it all in by reading it.

Mr. Levin: May I read this, then?

[fol. 48] Q. 138. (Continuing:)

"A. Because I went first to their house and they did not want to give me, and they said, 'We gave you some money already, why do you want more?' And I told them the con-

dition of my business, and they said, 'You have to give an assignment.' "

Mr. Guzik: Now, I object to it, if your Honor please, on the ground it is improper questioning. Counsel has read the entire testimony and asked the witness to refresh his recollection as to many points which are not relevant to this case and I submit that it is an improper manner of putting evidence into the record. I move to strike out the entire question.

The Court: Objection overruled.

Mr. Guzik: I respectfully except.

Q. 138. (Continuing:) Now, referring to the last portion of the testmiony which I read.

The Court: Wait, he has not answered your question.

Mr. Guzik: May I also make a——

The Court: The question is, did you so testify.

Q. 139. Was that your testimony?

A. Well, some of it is and some not.

Q. 140. You say this testimony is incorrect?

A. Not all is incorrect; some of it. There is a mistake there.

Q. 141. You mean in what way?

A. You say that a relative asked me for an inventory. I never said that.

Q. 142. That is wrong?

A. The creditors asked me for the inventory.

[fol. 49] Q. 143. Anything else wrong?

A. Well, that I told them that at that time I feel that I wouldn't be able to continue. I never said that. That must be—refer to the creditors.

Q. 144. You say that is a mistake, too?

A. That is a mistake, yes.

Q. 145. Anything else?

A. Well, you ask me another question; I will tell you. I don't remember exactly what it was. You read so much here. Those are two mistakes I find there.

Q. 146. Anything else?

Mr. Guzik: I object to that. Let him ask him what is wrong specifically.

The Court: He has given him the opportunity.

Mr. Guzik: I myself don't remember.

The Court: Give him the testimony and let him look it over. If there is anything you want to correct, do so.

Q. 147. Page 15 is where I started to read (handing the testimony to the witness).

A. I want to strike out "they asked me to make—take inventory and find out how I stand." I never told you that.

The Court: Just put it, I didn't testify so and so.

A. (Continuing:) Another thing I told them, "I am pressed. I do not see any way out of it." I didn't say that. Another thing, "When they gave you more money?" "They see I am behind and I wouldn't be able to pay it." I didn't know what they saw about it. I couldn't say that.

Another thing, "The other people found out something [fol. 50] was wrong and they didn't want to give me any more money." How can I testify about what they found? I don't know.

And then they say I told them the condition of the business, and they said "you have to give an assignment." They didn't say that. And I really—I wasn't able to tell the condition of the business I did not know how I stand myself before I took inventory.

They got words and I said "Yes."

Q. 148. What page are you reading from?

A. Page 17.

Q. 149. I didn't get that far.

A. All right. Did I skip one page, or what? Maybe I skipped one page. I guess I read all.

Q. 150. Have you read all the testimony?

A. Let me see the sixteenth page. Maybe I didn't read it. Page 16. Yes, I read that.

Q. 151. Now, you started to make some suggestions with respect to page 17?

A. No.

Q. 152. Do you want me to read it? If you have any corrections, make them.

A. You said I shouldn't read 17.

Mr. Guzik: Have you read those questions to the witness before?

Mr. Levin: No.

The Witness: You didn't. What is the use? Do you want me to read it?

Q. 153. Are you objecting to going further in the testimony?

A. I don't know.

Q. 154. I don't want you to do anything.

The Court: Just a minute. He offers to do it.

The Witness: I offer to do it, if you want me.

[fol. 51] The Court: Just wait until you are asked a question.

Q. 155. Did you give these people that you paid in June promissory notes for these loans?

A. No, I did not.

Q. 156. Did you have any agreement as to when this money was to be repaid?

A. Yes, sir.

Q. 157. What was the agreement?

A. With who?

Q. 158. With Mr. Schoenthal.

A. No, the money was given to me for thirty days' time. It was past due.

The Court: When were these loans made?

The Witness: In January.

Q. 159. When did you borrow money from Mr. Schoenthal?

A. In January, 1930. I think so.

Q. 160. And this loan from Mr. Schoenthal was a short time loan?

A. Yes.

Q. 161. In other words, it was past due for some months?

A. Past due, yes.

Q. 162. When did Fanny Schoenthal lend you the thousand dollars?

A. This I couldn't tell you. You had—You have the books. You can tell me better.

Mr. Guzik: I can tell you, to save time.

Mr Levin: I will accept your statement.

Q. 163. Look at these two checks and see if they can fix the time of the loans from Fanny Schoenthal?

A. One check is January 30th, 1930, for $500.00.

Q. 164. And the other?

A. The other check, May 28th, 1930, another $500.00.

Q. 165. What arrangement did you have about the return [fol. 52] of these two loans?

A. The May—or the first check was given on sixty days time and the other check was given to be paid back in two or three days.

Q. 166. So that both these loans were past due?

A. Positively.

Q. 167. Did you do much business in June, 1930?

A. Well, the books will show you everything.

Q. 168. Can you not give the Court some approximate idea?

A. We generally don't do much business in June. June is a slow month.

Q. 169. Am I correct in saying that practically all your sales in June, 1930, were for cash?

A. No, sir.

Q. 170. Did you sell much on credit?

A. Positively I did.

Q. 171. Could you say how much?

A. I couldn't tell you. The books will show you everything.

Q. 172. What book is this which I hold in my hand?

A. Sales book.

Q. 173. All shipments for June, 1930, would be noted in this book?

A. Positively.

Mr. Levin: I offer this book in evidence.

The Court: What is the object?

Mr. Levin: I want to show that practically all the business in June was on a cash basis.

The Court: Do you admit that?

Mr. Guzik: I do not know. If counsel will let me look over the book. I never saw the book. Did you make any computations? I will assume your computations to be correct and you may offer them in evidence.

Mr. Levin: I state that practically all the sales in June with a few exceptions were for cash.

[fol. 53] The Court: Is that correct?

The Witness: Not all; some of them were cash.

The Court: With a few exceptions?

The Witness: A few exceptions, yes. A few exceptions cash. I say all on credit, few exceptions on cash, as I recollect it. I couldn't tell you exactly.

Mr. Guzik: I will concede that we have gone over the book and that most of the sales are marked C. O. D. or Net Cash.

Mr. Levin: Your witness.

The Court: That is, the sales made by the bankrupt in the month of June, 1930?

Mr. Levin: That is right.

Cross-examination.

By Mr. Guzik:

X Q. 174. Mr. Smith, this was not the first loan that had been made to you by Morris Schoenthal, was it?

A. No.

The Court: Did he make him only one loan?

Mr. Guzik: No, he made him others. I want to bring that out.

X Q. 175. On September 25, 1928, did Morris Schoenthal lend you a thousand dollars?

A. I don't remember the date.

X Q. 176. I show you this check and ask you whether that is a check made out to your order which you deposited, in the sum of a thousand dollars, dated that date?

A. Yes, September 25, 1928.

Mr. Guzik: I offer that in evidence.

Mr. Levin: No objection.

(Marked Defendant's Exhibit A.)

[fol. 54] X Q. 177. Now, when he lent you that sum of $1,000.00, did he ask you how your business was at that time?

A. He didn't ask me.

X Q. 178. Did he inquire as to how your business was getting along?

A. He asked "How are you getting along in business?" and I told him I am getting along all right.

X Q. 179. Did you repay this sum of $1,000.00?

A. Yes, sir.

X Q. 180. How did you repay that?

A. I think I repaid it in three payments, or four payments.

X Q. 181. Do you remember when you made the first payment to Morris Schoenthal on this sum of $1,000.00?

A. I couldn't recollect that.

X Q. 182. In January, 1930, before you received this loan of $500.00, did you make any payments to Morris Schoenthal on the old loan of a thousand dollars?

A. I think I did.

X Q. 183. Did you, in January, 1930, while you still owed Morris Schoenthal a balance on the first loan, ask Morris Schoenthal to lend you money?

A. Yes.

X Q. 184. What did he say?

A. He said, "Pay me back whatever you owe me on the old loan and I will give you more."

X Q. 185. And did you, pursuant to that request, repay Morris Schoenthal the balance of that loan?

A. Yes, sir.

X Q. 186. I show you your book, or checkbook stub, No. 6541, showing a check to Morris Schoenthal in the sum of $250.00. Is that the last payment you made to Morris Schoenthal on the first loan of a thousand dollars?

A. I think it was. Yes. Payment of note, yes.

X Q. 187. I show you this check for $500.00, dated January 27, 1930, and ask you whether that represents loan made to you by Morris Schoenthal in that sum?

A. Yes, sir.

[fol. 55] Mr. Guzik: I offer it in evidence.

Mr. Levin: No objection.

(Marked Defendant's Exhibit B.)

X Q. 188. In other words, Mr. Smith, two days after you paid Morris Schoenthal $250.00, he lent you $500.00?

A. Yes, sir.

X Q. 189. And the only way you could get that second loan of five hundred dollars was to pay him the old loan of $250.00, is that it?

A. Yes.

X Q. 190. Now, did you tell Morris Schoenthal in Janu-

ary, 1930, at the time you paid him that loan, the exact condition of your business?

A. No, I never knew myself exactly.

X Q. 191. Did he ask you at that time the exact condition of your business?

A. He asked the general question, "How is business?"

X Q. 192. And that was in a sort of friendly way, was it not?

A. Yes.

X Q. 193. In June, 1930, you came to Morris Schoenthal for a loan, did you not?

A. Yes.

X Q. 194. How much did you ask him for?

A. A thousand dollars.

X Q. 195. Was there at that time due Morris Schoenthal five hundred dollars?

A. Yes.

X Q. 196. What did Morris Schoenthal tell you?

A. "You pay me back whatever you owe me and we will see what we are going to do further."

The Court: Said what?

The Witness: "Pay me back and we will see what I can do for you later."

X Q. 197. You were contemplating in June, 1930, getting an extension from your creditors, were you not?

A. Yes.

[fol. 56] X Q. 198. And that would require a considerable amount of cash, would it not?

A. Yes.

X Q. 199. Did you have any cash resources of your own, sir?

A. No, I didn't have any.

X Q. 200. From whom did you expect to get the money to finance the cash settlement?

A. Well, one of them would be Morris Schoenthal.

X Q. 201. Did you know that if you owed any money to Morris Schoenthal you could not get any new loans from him?

A. He told me that is his usual custom, the first thing to collect whatever I owe him.

X Q. 202. In other words, you would have to pay him first

the balance due at that time, and then he would make you another loan?

A. Yes, sir.

X Q. 203. Was Morris Schoenthal ever down at your place of business?

A. Never since I was in business.

X Q. 204. Did he ever take any active interest in the place of business?

A. Was never up there.

X Q. 205. Did Morris Schoenthal ever get any profit from your business?

A. Profit? A. No, never.

X Q. 206. Did you ever pay Morris Schoenthal a cent of interest on any of his loans?

A. He never wanted interest.

X Q. 207. Did he ask for interest?

A. He didn't ask.

X Q. 208. This petition that was filed against you was an involuntary petition, was it not?

A. Yes, sir.

X Q. 209. Now, in May, 1928, were you pressed by a creditor, the Foster Yarn Company?

A. Yes, sir.

X Q. 210. How much did you have to pay the Foster Yarn Company?

A. $6,000.00.

X Q. 211. Did you make a payment to the Foster Yarn Company of $500.00?

A. Yes, sir.

[fol. 57] X Q. 212. Where did you get that money from?

A. From Fanny Schoenthal.

X Q. 213. I show you this check dated May 28th, and ask you whether that represents the $500.00 you got from Fanny Schoenthal?

A. That is the last check.

X Q. 214. That is the last check?

A. Yes, this check, this money I got from her and I paid the Foster Yarn Company.

X Q. 215. So with this loan from Fanny Schoenthal you held off the Foster Yarn Company, did you not?

A. Yes, sir, yes, sure.

Mr. Guzik. I offer this check in evidence.

Mr. Levin: No objection.

(Marked Defendant's Exhibit C.)

X Q. 216. At what place did you receive this check from Fanny Schoenthal?

A. My house.

X Q. 217. Did you tell Fanny Schoenthal what the purpose was for which you needed this?

A. I told her I needed it to pay some bills.

X Q. 218. When did you tell her you would pay it back?

A. Two or three days.

X Q. 219. Did Fanny Schoenthal tell you that she needed money in June in order to pay for her real estate bills?

A. She told me she can only give me the money for two or three days, not any longer, because she needed the money herself.

X Q. 220. In other words, you knew she would have to have that money in June to pay for her real estate taxes, interest on mortgages?

A. Yes, sir.

X Q. 221. Is that why she told you you would have to give it back in a few days?

A. Positively.

[fol. 58] X Q. 222. In January, 1930, Fanny Schoenthal gave you $500.00. Is this the check for that? At the time that Fanny Schoenthal gave you this check for $500.00 did she know the condition of your business, did she ask you?

A. She asked a general question, same as everybody, "How is business?", and I told her I am getting along all right.

X Q. 223. Did she ask you about your inventory?

A. Never asked about that.

X Q. 224. Did she ask you how much cash you had in the bank?

A. Didn't ask me that.

X Q. 225. Did she ask how much your financial statement showed?

A. She didn't ask me that.

The Court: In other words, the only question she asked was the question any relative would ask, is that correct?

The Witness: Sure.

Mr. Guzik: I offer this check in evidence.

Mr. Levin: No objection.

(Marked Defendant's Exhibit D.)

X Q. 226. Morris Schoenthal is a brother of your wife's?
A. Yes.
X Q. 227. Did your wife know about these loans?
A. Sure.
X Q. 228. When did you propose to your creditors an extension of your debts?
A. I think that was in July.
X Q. 229. And as a result of that the petition was filed against you, was it not?
A. Yes.
X Q. 230. Did you have any suits pending against you before that?
A. No.
X Q. 231. Did any of your creditors take any proceedings against you prior to that time when you told them your true condition?
A. No.
[fol. 59] X Q. 232. How much did you owe to the Foster Yarn Company at that time?
A. I think around $6,000.00.
X Q. 233. Did they take any proceedings against you?
A. No, everybody was lenient to me; knew me for many years.
X Q. 234. How long have you been in business?
A. Oh, about twenty-five years.
X Q. 235. Did you ever have any other bankruptcies?
A. No.
X Q. 236. Were there any judgments against you in June, 1930?
A. No judgments.
X Q. 237. Were there any suits pending against you?
A. No.
X Q. 238. You had $1770.00 in outstanding accounts, according to your statement, is that correct?
A. Positively.
X Q. 239. Some of these names represent large firms, do they not?
A. Yes.
X Q. 240. Is it not a fact that if you wanted money you

could have gotten this money from these firms if you offered them a discount?

A. Positively.

X Q. 241. Did you do that?

A. No.

X Q. 242. Weiner & Jaffe, 552 Broadway, owed you $502.00. That is a large concern, is it not?

A. Sure.

X Q. 243. Could they have given you the $500.00 at a discount?

Mr. Levin: I object to what might have happened.

The Court: You would have to bring the other people in to state what they would do.

Mr. Guzik: I will withdraw it.

[fol. 60] X Q. 244. Did you make any attempts to cash in on your accounts receivable?

A. No.

X Q. 245. Did you make any jobber sales in June, 1930?

A. Some of it, yes.

X Q. 246. How much of the stock of inventory did you have left at the time the petition was filed against you?

A. I think I got around $16,000.00.

Mr. Guzik: May I ask the trustee to state the proceeds of sale by the trustee of the stock and fixtures.

Mr. Levin: I read into the record that the trustee's balance amounted to in excess of three thousand dollars.

Mr. Guzik: And I want the balance. I want the proceeds of the inventory and proceeds of stock and fixtures.

Mr. Levin: The total receipts of the receiver were $5,756.44. This represents gross receipts from the auction sale of all property, the collection of accounts receivable and bank interest.

Mr. Guzik: May I ask the trustee to state whether there are any outstanding uncollected accounts receivable?

Mr. Levin: I can speak only generally, that there are uncollected accounts receivable in process of collection. One of those I know, of my own knowledge, to be the Manhattan Jobbing Company, and is in suit. That is as far as I can tell you right now. I can get you the specific information, if you want it.

Mr. Guzik: I will appreciate it, if you can.

X Q. 247. Did you call any creditors' meetings before June 1st, 1930?

A. No.

[fol. 61] X Q. 248. Did you make any offer to your creditors at any time prior to the dates on which you paid the $500.00 to Morris Schoenthal and the thousand dollars to Fanny Schoenthal?

A. No, I did not.

X Q. 249. At the time you made these payments did you have any idea that you were insolvent?

A. No, I never had that idea. I thought I am all right.

X Q. 250. How old is Fanny Schoenthal?

A. She is maybe around—over fifty-five, I guess.

X Q. 251. So when you testified before the receiver in the 21-A examination that she was about thirty, that was a mistake, was it not?

A. I am surprised that you say that.

X Q. 252. If you were told that that is your testimony before the Referee, would you be surprised?

Mr. Levin: I object.

The Court: You are not concerned with whether he is surprised.

X Q. 253. Is this answer correct: "Q. How old is she?" meaning Fanny Schoenthal; "A. Around thirty." Is that correct?

A. No.

X Q. 254. You have seen Fanny Schoenthal?

A. Yes.

X Q. 255. Does she look like thirty? How old does she look like?

A. Over fifty—fifty-five.

X Q. 256. That is her true age, is it not?

A. Yes.

X Q. 257. In July, when you made the proposal for extension to your creditors, what happened?

A. They refused it.

X Q. 258. Did you make any further attempt to keep in business?

A. No, I gave them an offer of twenty-five per cent settlement.

X Q. 259. Did you make any attempt to file a petition in bankruptcy?

A. No.

[fol. 62] X Q. 260. The petition was filed involuntarily against you?

A. Yes, sir.

X Q. 261. Did you have a lawyer in the proceedings?

A. No.

X Q. 262. Did you have a lawyer present when you were examined on the 21-A examination?

A. No; I couldn't afford it.

X Q. 263. Did you make a large withdrawal of cash from your business in June, 1930, for your own purposes?

A. No.

X Q. 264. All you drew was fifty dollars a week for your own living?

A. Yes, sir.

X Q. 265. Did you pay your labor at that time?

A. Yes, sir.

X Q. 266. In June, 1930, your sales book shows a considerable amount of cash sales. Is it not a fact that most of those sales were on ten days credit?

A. You see, we used to charge them cash but they never paid cash; sent their check in ten days, twenty days.

X Q. 267. But it was noted as net cash, is that not correct?

A. Not correct; some of them is correct, but not all.

X Q. 268. In other words, some of these you have noted in here net cash did not pay until ten days?

A. No.

X Q. 269. Some of them were new accounts?

A. New accounts, never sold them before and didn't want to give them any trial.

X Q. 270. In other words, you did not want to take their credit?

A. No.

X Q. 271. In June, 1930, did you tell Fanny Schoenthal that you were about to go under and that you were about to file a petition in bankruptcy, or anything to show that you were insolvent?

A. No, I never told her that.

X Q. 272. Did you say anything like that to Morris Schoenthal?

A. No, sir.

[fol. 63] X Q. 273. Did you give them any reason to believe that you were about to file a petition in bankruptcy or that a petition in bankruptcy or that a petition in bankruptcy was about to be filed against you?

A. I was always under the impression I am solvent.

The Court: Answer the question.

The Witness: Never answered that.

X Q. 274. At the time you gave them these payments did you intend to file a petition in bankruptcy?

A. No, sir.

Mr. Guzik: That is all.

Redirect examination.

By Mr. Levin:

R. D. Q. 275. Did I unders' nd you to say, Mr. Smith, that there were no suits started against you?

A. Not that I recollect.

R. D. Q. 276. How about the Davis Yarn Company, did they start a suit?

A. Well, I was served with a summons.

R. D. Q. 277. Oh, I see, you were just served with a summons?

A. That was the two days before the meeting.

R. D. Q. 278. I did not ask you when; I merely asked you whether anyone started a suit against you.

A. I answered that question. The Davis Yarn Company served me a summons two days before the meeting.

R. D. Q. 279. So you were incorrect when you told counsel that nobody started suit against you?

Mr. Guzik: I object. I asked him about June.

(R. D. Q. 279 repeated.)

The Court: Were you incorrect?

[fol. 64] The Witness: I wasn't incorrect. I think it was the summons was served at the same time they had the meeting, if I recollect, and they withdrew it right away.

R. D. Q. 280. Where did you turn over these checks to the relatives to whom you made payments in June, at your place of business?

A. No.

R. D. Q. 281. Where?

A. Well, I was over to Mr. Schoenthal's house when I gave him the check.

R. D. Q. 282. Is that where you gave Fanny Schoenthal the check?

A. No, Fanny Schoenthal was in my house.

R. D. Q. 283. Where does she live?

A. You have records there.

R. D. Q. 284. I am asking you that.

A. Where does she live now?

R. D. Q. 285. Where did she live?

A. St. Ann's Avenue. I don't remember the number.

R. D. Q. 286. Is that very far from your house?

A. Yes, she used to come to my house often.

R. D. Q. 287. I understand she is a very sick woman and cannot travel much.

A. Not at that time.

R. D. Q. 288. How long has she been sick?

A. Since 1931, I guess.

R. D. Q. 289. Who prepared the schedules in bankruptcy for you?

A. My accountant.

R. D. Q. 290. That is the same accountant that you have paid that hundred dollars to?

A. Yes, sir.

R. D. Q. 291. Is he a lawyer?

A. No.

Mr. Levin: That is all.

Recross-examination.

By Mr. Guzik:

R. X Q. 292. Just a minute, Mr. Smith. This Davis Yarn Company summons, was that in June, 1930?

A. July.

Mr. Guzik: That is all.

Mr. Levin: The plaintiff rests.

[fol. 65] MOTION TO DISMISS

Mr. Guzik: If your Honor please, at this time I move to dismiss the complaint on the ground that there is no equity jurisdiction in that it is an action to recover a stated sum of money, which, under the Constitution of the United States, the defendant is entitled to a jury trial on the law side of the Court; and I further move that the plaintiff has wholly failed to make out a cause of action. He has not only failed to prove insolvency at the time of these payments, but he has failed to prove any notice or reasonable cause on the part of these people to know that this man contemplated—or, in fact, how could he contemplate when, as he says, there was a petition filed in July, 1930, and there wasn't a single suit pending against him in June, 1930.

The Court: Motion denied. Exception.
Mr. Guzik: I respectfully except.

Prima facie proofs closed.

DEFENDANTS' PROOFS

MORRIS SCHOENTHAL, called as a witness in his own behalf, having been duly sworn, testified as follows:

Direct examination.

By Mr. Guzik:

Q. 1. You are the defendant, Morris Schoenthal?
A. Yes, sir.
Q. 2. Where do you reside?
A. Home or business?
[fol. 66] Q. 3. Reside, where do you live?
A. In 1475 Sheridan Avenue, Bronx.
Q. 4. In June, 1930, you received the payment of $500.00?
A. Yes, sir.
Q. 5. From Leonard H. Smith, in repayment of a loan that you made to him, is that so?
A. Yes, sir.
Q. 6. At the time he gave you that check for $500.00, did you know the condition of his business?

A. Absolutely not.

Q. 7. Were you ever at his business?

A. Not in my life, I am sorry.

Q. 8. Did you ask Leonard H. Smith the condition of his business at that time?

A. Never.

Q. 9. Did you have any reason to believe that Leonard H. Smith was in an insolvent condition?

Mr. Guzik: I will withdraw that.

Q. 10. Did you know that his condition was bad?

A. No, I didn't know at all.

The Court: What day?

Q. 11. On June 9th, when you received the check of $500.00 from Leonard H. Smith, did you have any reason to believe, to know the true condition of his business?

A. I didn't know anything whatsoever.

Mr. Guzik: That is all.

Cross-examination.

By Mr. Levin:

X Q. 12. What business are you in, Mr. Schoenthal?

A. In silk, velvets, and ribbons, since thirty years.

X Q. 13. That is a corporation?

A. Corporation since eight years.

[fol. 67] X Q. 14. And you are the head of that firm?

A. I am the president of the Morgan-Kunze, Inc.

X Q. 15. Who is your accountant?

A. For the business?

X Q. 16. Yes.

A. Tropp; Marty Tropp, I think it is.

X Q. 17. What is the firm?

A. This I don't know. You have to call up the office—Joseph N. Tropp.

X Q. 18. These loans that were made by you were on the basis of short time loans, is that right?

A. I would make all the time, say, thirty or sixty, only I got to get it.

X Q. 19. Please, when you originally made this loan of a thousand dollars, in January, 1930——

A. 1928. 1928, please.

X Q. 20. I am talking about the loan in January, 1930, of $1,000.00.

A. I never gave him a thousand dollars.

X Q. 21. $500.00; I beg your pardon—when was that to be repaid?

A. Short times.

X Q. 22. Mr. Smith testified it was to be repaid in thirty days.

A. I suppose so. I don't remember.

X Q. 23. Is that right?

A. Yes.

X Q. 24. When was the other loan made of $500.00?

A. There was no other loan. There is no other loan, please. Only five hundred.

X Q. 25. That is the only transaction you have had?

A. And the thousand dollars was before—1928, the 25th of September.

X Q. 26. When did you commence asking Mr. Smith for the return of this $500.00?

A. After thirty days. He happened to come up in my house. I asked him how about the money. He says, "Surely, I am going to pay you."

X Q. 27. How long had you been asking him?

A. I don't remember.

[fol. 68] X Q. 28. Did you get a promissory note for the loan?

A. No note, no interest, nothing whatsoever.

X Q. 29. When the second thirty days expired, did you say anything to Mr. Smith about the return of the money?

A. When he came up to my house—my wife broke her leg——

X Q. 30. Talk more slowly.

A. From the accident in the subway and they came visiting my wife and I would ask him for the money and he said, "I am going to give it to you shortly."

X Q. 31. Did you ask him for the money in March?

A. I don't remember.

X Q. 32. Did you ask him for the money in May?

A. I don't remember. Maybe I asked him before or after.

X Q. 33. Did you ask him for the money in June?

A. You are asking me questions in May, when I don't remember whether I asked him——

The Court: Just answer the question.
The Witness: I couldn't answer, your Honor.
The Court: Then say so.
The Witness: It is something I cannot say.

(X Q. 33 repeated.)

The Court: Say yes or no, or you do not know.
The Witness: I don't remember.

X Q. 34. Is it not a fact that this money was returnable by Smith at any time that he wanted?
A. Oh, no, I would ask him for the money. I needed it.
X Q. 35. You needed the money?
A. I need it all the time, yes, to give somebody else.

[fol. 69] Mr. Guzik: If your Honor please, may I suggest to you, Mr. Schoenthal, as a lawyer, to answer questions?

X Q. 36. Did you need this money in June?
A. I need the money all the time, on account I bought bonds and stock. I have proof of it right here.

The Court: You are not called upon for that. Put it back in your pocket.

X Q. 37. You are not called for that yet.
A. I haven't been in court for forty years.

Mr. Guzik: Will you listen to the Court, Mr. Witness? Will you please put that book in your pocket as you are told?

X Q. 38. Mr. Smith did not return this money in June to you because you needed it?
A. I was asking all the time. I wanted to get paid.

The Court: Just a minute. You needed this money? Answer yes or no.
The Witness: Yes.

X Q. 39. You came to Mr. Smith?
A. I didn't come; he came to my house.
X Q. 40. Did you go to Mr. Smith and say I need this money badly?
A. I said I want to get back the money I loaned him on account of him asking for more money. I said my policy

for thirty years, for different people I want to loan it, but I want to get back the money owing before I loaned any more money.

X Q. 41. I understood you to say that you told Mr. Smith you needed this money?

A. I had a right to say so.

[fol. 70] X Q. 42. I am not quarreling with you. I am trying to find out the facts.

A. I had a right.

X Q. 43. Did you need the money?

A. I did need the money. That is my business.

The Court: Do not get into an argument.

X Q. 44. Do you not know, as a matter of fact, Mr. Schoenthal, when I examined you before the Referee you told him you did not need the money?

A. I don't remember. It was in August. How could I remember?

The Court: Just say you do not remember.

X Q. 45. Now, reading from your examination conducted before the Referee on August 8th, 1930.

A. Right.

X Q. 46. I read you this question and answer, which you gave:

"Q. I understood you to say you loaned this money with the understanding that he could pay it back whenever he had it?

A. He was my cousin, and I helped him out. I didn't need it, but I would ask him. I didn't need the money."

A. Ask——

X Q. 47. Was that answer right?

A. I don't remember what, but I needed the money.

The Court: You don't remember. That is all.

Redirect examination.

By Mr. Guzik:

R. D. Q. 48. In January of 1930, Leonard H. Smith owed you $250.00, is that correct?

A. I have here a little ticket——

[fol. 71] R. D. Q. 49. Do you know, or do you not know?
A. Yes.
R. D. Q. 50. And before you lent him another $500.00, you asked him to repay that to you?
A. First pay.
R. D. Q. 51. So two days after he paid you $250.00 you lent him $500.00?
A. Right. I gave him $500.00.

Recross-examination.

By Mr. Levin:

R. X Q. 52. Just one minute. Now, was this loan a thirty day loan, or was Mr. Smith to have the privilege of paying it back whenever he could?

Mr. Guzik: I object as already answered.
Mr. Levin: I will withdraw the question.

Motion to Dismiss

Mr. Guzik: The defendant rests and renews the motion made at the close of the plaintiff's case.
The Court: Motion denied.
Mr. Guzik: May I at this time renew a motion for the adjournment of the preference action of Fanny Schoenthal on the ground that she is ill and can not testify? If counsel for the trustee will concede if she were present she would testify that she had no knowledge——
Mr. Levin: For the purpose of the record, I will concede that Fanny R. Schoenthal, if called, would testify in substance that she had no knowledge of the bankrupt's financial condition and made no inquiry.

(Argument off the record.)

[fol. 72] Mr. Guzik: I offer this statement of the doctor in evidence.
Mr. Levin: I object to the statement offered in evidence on the ground that it is immaterial and irrelevant, and, furthermore, it has been altered, that there have been additions since it was submitted to me.
Mr. Guzik: It was what the doctor stated.

Mr. Levin: In view of the fact that the bankrupt saw this witness at his house, there was a change.

The Court: Read it.

Mr. Guzik (reading):

OFFER IN EVIDENCE

"STATE OF NEW YORK,
County of New York, ss:

"Dr. Lester Moskowitz, being duly sworn, deposes and says, That I am a practising physician duly licensed to practice in the State of New York and was admitted to practice in the year 1909.

"I am personally familiar with Miss Fannie R. Shoenthal and have attended her for the past three years for minor ailments. About a year ago she was stricken with an acute cardiac collapse necessitating her being kept in bed for a period of about two months with constant attention, together with consultations with heart specialists.

"The said Fannie Shoenthal is still suffering from the same illness of cardiac decompensation, as evidenced by shortness of breath, precordial pain, cyanosis; it was impossible for the said Fannie Shoenthal to appear in any [fol. 73] court or for her examination in her home without seriously threatening her life. That condition has existed for nearly a year and still exists at the present time.

"As a physician I advise absolutely against any appearance in court or any examination at her home of the said Fannie Shoenthal, as I fear that strain of such an examination and resultant shock might lead to another serious heart attack, which might prove fatal.

"For the past two months I have only allowed her to go down occasionally and then only to sit in the park for a short while."

Mr. Levin: I object to the admission of this statement in evidence, on the ground that it is immaterial and irrelevant, and on the further ground that the Court has on numerous occasions already ruled that the defendant has not acted diligently to protect its rights under the circumstances. I call your attention to the fact that the issue in this case was joined in November, and set down for trial in

December, and though this defendant's alleged illness has been extended and extended from time to time and no effort has been made or notice given me until the case was on the call calendar and marked ready, that any such application would be made. I question its good faith.

The Court: It is admitted as I understand, as part of the defendant's case; not for the purpose of any motion.

Testimony closed.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

February (1931) Term

Before Hon. J. Foster Symes, District Judge

Krause & Hirsch, Solicitors for Plaintiff; George C. Levin, Counsel.

Martin Perlmutter, Solicitor for Defendants Schoenthal; Leo Guzik, Counsel.

MEMORANDUM OPINION—Febr. 25, 1931

The COURT (orally):

This action is brought by the Trustee in Bankruptcy under Section 60-B of the Bankruptcy Act to recover from defendants property alleged to have been transferred to them in violation of the statute, in contemplation of bankruptcy. The defendant, Hyman Smith, was not served and is not a party. The case has gone forward against the other two defendants.

Briefly, the testimony discloses all the parties are related, that is to say, Morris Schoenthal and Fannie Schoen-
[fol. 75] thal, brother and sister, are cousins of the bankrupt.

The bankrupt testified that in June, 1930, he did not know how he stood financially, but early in that month hired a public accountant to investigate his business, paying him $100 for so doing. What his report discloses is not in evidence, but very shortly thereafter he offered his creditors twenty-five cents on the dollar.

The defendants Morris Schoenthal and Fannie Schoenthal had been lending money to the bankrupt for some time previous to June, 1930. These loans began in September, 1928. The bankrupt testified he could obtain funds from these parties, $500 or more, at any time upon request. Bankrupt made frequent payments on account or in full followed by further advances to him. These loans were for a short time and were most of the times past due.

Coming down to June, 1930, the month previous to the filing of the involuntary petition the bankrupt testified he went to defendants for more funds. He was refused and was met with a demand for payment of moneys already due.

Beginning June 9, 1930, a short time after he had been informed by the public accountant of the state of his business, he began making the payments to the Schoenthals, which the Trustee here seeks to recover. During that month and previous to the filing of the petition, he paid his relatives in all $2,300, most of it to the defendants Morris and Fannie Schoenthal. During this particular month all his sales were, with few exceptions, for cash or C. O. D.; he further states he had no cash resources and that he knew he was insolvent.

The money paid was due and owing at the time of the payments, and no fraud is alleged or proven. The question [fol. 76] is, under Section 60-B of the Bankruptcy Act, did these payments operate as a preference and did defendants have reasonable cause to believe that the payments would effect a preference, that is, enable them to receive a larger payment on their debt than other creditors of the same class.

Insolvency has been shown. The fact that shortly after the payments were made the bankrupt offered 25 per cent to his creditors is sufficient on that question. It is an admission that his assets equaled 25 per cent of his liabilities.

It has always been my view in similar situations that relatives lending money are generally conversant with their debtor's affairs or have knowledge or such facts as would put them on inquiry as reasonable men. No business man of any experience would lend money continuously, in this case for two years, without making some inquiry or having some knowledge of the business affairs of his debtor.

The defendant, Morris Schoenthal, showed himself to be a very successful business man; standing well with his bankers, and his conduct of his own business reflects credit upon him. That is wholly inconsistent with the claim that he lent money to his relative, without some knowledge of the latter's affairs. Such course of conduct, as here disclosed, is indicative that he either did know or if he did not he was so negligent that he has no standing in a court of equity.

The theory of bankruptcy is that all creditors must be treated alike. If a bankrupt wants to take advantage of its generous provisions, he must do so upon the conditions laid down by the law.

[fol. 77] The Court will make findings of fact and conclusions of law in favor of the plaintiff and against the defendants, and proper exceptions may be allowed.

I find damages in favor of the plaintiff in the sum of $1,500.

—— ——, United States District Judge.

New York, February 25th, 1931.

STATEMENT RE PLAINTIFF'S EXHIBIT 1

Certified copy of an order made by Hon. Harold P. Coffin, Referee in Bankruptcy, dated September 8th, 1930, approving the Trustee's bond.

STATEMENT RE PLAINTIFF'S EXHIBIT 2

Trustee's first report dated September 19th, 1930, shows that the Trustee had a balance on hand on that date to the credit of the Estate in the sum of $5,097.10.

STATEMENT RE PLAINTIFF'S EXHIBIT 3

Order of Referee Honorable Harold P. Coffin, dated September 24th, 1930, declaring a first dividend of 10%.

[fol. 78] PLAINTIFF'S EXHIBIT 4

Schedules in Bankruptcy of Leonard H. Smith, Trading as Faultless Sweater Mills

Schedule "A"—Liabilities:

Priority Creditors	$498.54
Unsecured Creditors	18,401.72
	$18,900.26

Schedule "B"—Assets:

Merchandise Inventory	3,624.88
Machinery, fixtures and tools	9,282.15
Choses in Action	1,770.01
Unliquidated Claims	1,026.73
Bank Account	250.11
	$15,953.88

Total assets	$15,953.88
Total liabilities	18,900.26

Books

General Ledger.
Accounts Payable (Faultless Sweater Mills).
Accounts Receivable (College Sweater Mills).
Accounts Receivable.
Cash Journal.
Purchase Journal.
Check Books: Chatham & Phenix Bank & Trust Co.
Pass Books: Chatham & Phenix Bank & Trust Co.
Shipping Slips—College Knitting Mills.
Charge Books.
Credit Book (front Faultless, back College).
[fol. 79] Salesman's Ledger.
Labor Record.
Duplicates of Charges—College Knitting Mills.
Bank Statements & Cancelled Checks.
Notes Payable Stubs.

(The above schedules were sworn to on August 5th, 1930, and filed on August 18th, 1930.)

PLAINTIFF'S EXHIBIT 5

Faultless Sweater Mills, 105-113 Wooster St.

No. 6784 B. New York, June 7, 1930.

Pay to the Order of Blum Blackman Co. $100.00 Dollars One Hundred Dollars.

Faultless Sweater Mills. L. H. Smith, Proprietor.

Chatham Phenix National Bank and Trust Company, 1-30 Broadway and Howard Street.

Endorsement: Blum Blackman Co.

[fol. 80] PLAINTIFF'S EXHIBIT 6

Faultless Sweater Mills, 105-113 Wooster St.

No. 6787 B. New York, June 9, 1930.

Pay to the Order of Morris Shoenthal $500.00 Dollars Five Hundred Dollars.

Faultless Sweater Mills. L. H. Smith, Proprietor.

Chatham Phenix National Bank and Trust Company, 1-30 Broadway and Howard Street.

Endorsement: Morris Shoenthal.

PLAINTIFF'S EXHIBIT 7

Chatham Phenix National Bank and Trust Company, 1-30 Broadway and Howard Street

No. — B. New York, June 11, 1930.

Pay to the Order of Fanny Shoenthal $500.00 Five Hundred and no/100 Dollars.

Faultless Sweater Mills. L. H. Smith.

Endorsement: Fanny Shoenthal. Fanny R. Shoenthal.

[fol. 81] PLAINTIFF'S EXHIBIT 8

Faultless Sweater Mills, 105-113 Wooster St.

No. 6482 B. New York, June 19, 1930.

Pay to the Order of Fannie R. Shoenthal $500.00/100 Five Hundred and 00/100 Dollars.

Faultless Sweater Mills. L. H. Smith, Proprietor.

Chatham Phenix National Bank and Trust Company, 1-30 Broadway and Howard Street.

Endorsement: Fannie R. Shoenthal.

PLAINTIFF'S EXHIBIT 9

Faultless Sweater Mills, 105-113 Wooster St.

No. 6965 B. New York, June 24, 1930.

Pay to the Order of Hyman Smith $300.00/100 Three Hundred and no/100 Dollars.

Faultless Sweater Mills. L. H. Smith, Proprietor.

Chatham Phenix National Bank and Trust Company, 1-30 Broadway & Howard St.

Endorsement: Hyman Smith. Pay to the Order of the First National Bank of Boston. Smith Furniture Co.

[fol. 82] PLAINTIFF'S EXHIBIT 10

Chatham Phenix National Bank and Trust Company

Outstanding Certified Voucher K 53814

The item described below was charged to your account, but is still outstanding.

Charge Faultless Sweater Mills $500.00

Date certified: 6/30/30. Teller: T. Hyman Smith.

Exchange this slip for above item in a few days

DEFENDANT'S EXHIBIT "A"

Chatham Phenix National Bank and Trust Company,
Seventh Ave. and 39th Street

No. —. New York, Sep. 25, 1928.

Pay to the order of L. Smith $1,000.00/100 Ten Hundred 00/100 Dollars.

Morris Shoenthal.

Endorsement: L. Smith. Faultless Sweater Mills.

[fol. 83] DEFENDANT'S EXHIBIT "B"

Chatham Phenix National Bank and Trust Company,
Seventh Ave. and 39th Street

No. —. New York, Jan. 27, 1930.

Pay to the order of L. H. Smith $500 00/100 Five Hundred Dollars.

Morris Shoenthal.

Endorsement: L. H. Smith.

DEFENDANT'S EXHIBIT "C"

Staten Island National Bank & Trust Company, Port Richmond, S. I., N. Y.

Port Richmond,
No. 68. S. I., N. Y., May 28, 1930.

Pay to the order of Leonard Smith $500 00/100 Five Hundred 00/100 Dollars.

Fannie R. Shoenthal.

Endorsement: Leonard Smith.

[fol. 84] DEFENDANT'S EXHIBIT "D"

Staten Island National Bank & Trust Company, Port Richmond, S. I., N. Y.

Port Richmond,
No. 298. S. I., N. Y., January 30, 1930.

Pay to the order of Leonard Smith $500 00/100 Five Hundred 00/100 Dollars.

Fannie R. Shoenthal.

Endorsement: Leonard Smith.

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—March 2, 1931

The above entitled action having come on to be heard before me at an Equity Term of this Court, and the proofs of both parties having been duly heard on the 24th and 25th days of February, 1931, and the arguments of counsel having been duly considered,

I do hereby make the following findings of fact and conclusions of law:

Findings of Fact

1. That on or about the 10th day of July, 1930, an involuntary petition in bankruptcy was duly filed by three creditors of the bankrupt herein in the United States District Court, for the Southern District of New York, praying that Leonard H. Smith, trading as Faultless Sweater Mills, be adjudicated a bankrupt.

[fol. 86] 2. That thereafter on the 23rd day of July, 1930, an order was duly made in the said Court adjudicating the said individual trading as Faultless Sweater Mills a bankrupt.

3. That at all the times hereinafter mentioned, the plaintiff, Irving Trust Company, was a domestic corporation, organized and existing under and by virtue of the laws of the State of New York, engaged in the banking and trust business.

4. That thereafter at a first meeting of creditors of the said Leonard H. Smith, trading as Faultless Sweater Mills, duly held on the 5th day of September, 1930, before Hon. Harold P. Coffin, Referee in Bankruptcy in charge of said proceeding, the plaintiff was duly elected Trustee in Bankruptcy of the said bankrupt estate, and that plaintiff duly qualified thereafter and has continued to act and is now acting as such Trustee.

5. That within four months prior to the date of the filing of the said involuntary petition in bankruptcy, while insolvent and indebted to the defendants, Morris Schoenthal

and Fannie R. Schoenthal, and divers other creditors of the same class, upon unsecured indebtedness, provable in bankruptcy, and well knowing such insolvency, the said bankrupt did, within four months prior, as aforesaid, and on or about the 9th day of June, 1930, make a transfer of his property to the defendant, Morris Schoenthal, by paying to him the sum of $500.00, and that on or about the 11th day of June, 1930 and the 19th day of June, 1930, within four [fol. 87] months prior as aforesaid, the bankrupt did make transfers of his property to the defendant, Fannie R. Schoenthal, by paying to the said defendant, Fannie R. Schoenthal, the sum of $500.00 on each of the said dates, making a total transfer to the defendant, Fannie R. Schoenthal of $1,000.

6. That the effect of the said transfers to the defendants, Morris Schoenthal and Fannie R. Schoenthal, by the said bankrupt was to enable the said defendants to obtain a greater percentage of their debt than any other creditor of the said bankrupt of the same class as the defendants, and that the said payments did thus operate as a preference under the provisions of the Bankruptcy Act of 1898 and the amendments thereto.

7. That the defendants, Morris Schoenthal and Fannie R. Schoenthal, received the said transfers knowing or having reasonable cause to believe that the said transfer did effect a preference in violation of the provisions of the Bankruptcy Act, and the amendments thereto.

8. That the plaintiff has insufficient assets in its hands to pay the debts of the said bankrupt.

9. That the plaintiff has duly demanded the restoration and return of the said preferential payments, but that the said defendants have in all respects refused the said demands.

Conclusions of Law

1. That the transfers to the defendants, Morris Schoenthal of $500 on or about the 9th day of June, 1930, and to [fol. 88] the defendant, Fannie R. Schoenthal of $500.00 on the 11th day of June, 1930 and of $500.00 on the 19th

day of June, 1930, were preferential and void and constitute a voidable preference within the intent and meaning of Section 60b of the National Bankruptcy Act of 1898 and the amendments thereto.

2. That the plaintiff is entitled to judgment against the defendant, Morris Schoenthal, for the sum of $500.00 plus interest from the 9th day of June, 1930, together with one-third of the costs and disbursements of this action.

3. That the plaintiff is entitled to judgment against the defendant, Fannie R. Schoenthal, for the sum of $1,000.00, plus interest from the 19th day of June, 1930, together with two-thirds of the costs and disbursements of this action.

4. That the plaintiff is entitled to judgment against Morris Schoenthal and Fannie R. Schoenthal accordingly.

Dated New York, March 2nd, 1931.

J. Foster Symes, U. S. D. J.

[fol. 89] IN UNITED STATES DISTRICT COURT

In Equity. No. 55—256

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Leonard H. Smith, Trading as Faultless Sweater Mills, Bankrupt, Plaintiff,

against

MORRIS SCHOENTHAL, FANNIE R. SCHOENTHAL, and HYMAN SMITH, Defendants

DECREE—March 2, 1931

The above entitled action having duly come on for trial before me, and the proofs of both parties having been duly taken on the 24th and 25th days of February, 1931, and after hearing Krause & Hirsch, Solicitors for the plaintiff, by George C. Levin, Esq., of counsel, and Martin Perlmutter, Solicitor for the defendants, Morris Schoenthal, and Fannie R. Schoenthal, by Leo Guzik, Esq., of counsel, in opposition thereto, and due deliberation having been had, and the Court having duly made findings of fact and conclusions of law, and upon the opinion of this Court,

Now on said findings of fact and conclusions of law, and on motion of Krause & Hirsch, Solicitors for the plaintiff, it is

Ordered, adjudged and decreed that the plaintiff, Irving Trust Company, as Trustee in Bankruptcy of Leonard H. [fol. 90] Smith, trading as Faultless Sweater Mills, bankrupt, recover from the defendant, Morris Schoenthal, the sum of $500.00, with interest from the 9th day of June, 1930, amounting to the sum of $21.41, together with one-third of the costs and disbursements of this action as taxed by the Clerk of this Court in the amount of $17.33, making in all the sum of $538.74, and that the plaintiff have execution therefore, and it is further

Ordered, adjudged and decreed that the plaintiff, Irving Trust Company, as Trustee in Bankruptcy of Leonard H. Smith, trading as Faultless Sweater Mills, bankrupt, recover from the defendant, Fannie R. Schoenthal, the sum of $1,000.00 with interest from the 19th day of June, 1930, amounting to the sum of $41.17, together with two-thirds of the costs and disbursements of this action as taxed by the Clerk of this Court in the amount of $34.67, making in all the sum of $1,075.84, and that the plaintiff have execution therefor.

Dated New York, March 2nd, 1931.

J. Foster Symes, U. S. D. J.

[fol. 91] In United States District Court

[Title omitted]

Proposed Findings of Fact and Conclusions of Law of Defendants Schoenthal—March 2, 1931

Sirs: Please take notice that the following are the proposed findings of fact and conclusions of law on behalf of the defendants Morris Schoenthal and Fannie R. Schoenthal.

Findings of Fact

I. That on or about the 9th day of June, 1930, the 11th day of June, 1930, and the 19th day of June, 1930, Leonard H. Smith, trading as Faultless Sweater Mills, was not insolvent.

II. That on the 27th day of January, 1930, the defendant Morris Schoenthal loaned the sum of $500.00 to Leonard H. Smith, and that on the 9th day of June, 1930, the said sum of $500.00 was due and owing from Leonard H. Smith to Morris Schoenthal.

[fol. 92] III. That on or about the 30th day of January, 1930, and on or about the 28th day of May, 1930, Fannie R. Schoenthal loaned to Leonard H. Smith the sum of $500.00 on each of said dates, making a total of $1,000.00 which was due and owing on the 11th day of June, 1930.

IV. That on June 9th, 1930, at the time when Morris Schoenthal received the sum of $500.00 in payment of the aforesaid loan by Leonard H. Smith, the said Morris Schoenthal had no knowledge of any alleged insolvency of the said Leonard H. Smith, nor did the said Morris Schoenthal have any reasonable cause to believe that the said Leonard H. Smith was insolvent.

V. That on the 11th day of June, 1930, and on the 19th day of June, 1930, when Fannie R. Schoenthal received the two respective sums of $500.00 in payment of the loans made by her to Leonard H. Smith, the said Fannie R. Schoenthal had no knowledge of any alleged insolvent condition of the said Leonard H. Smith, and had no reasonable cause to believe that the said Leonard H. Smith was insolvent.

Conclusions of Law

1. That the payments to the defendant Morris Schoenthal of $500.00 on or about June 9th, 1930, and the payments to the defendant Fannie R. Schoenthal of $500.00 on the 11th day of June, 1930, and the $500.00 on the 19th day of June, 1930, were not preferential, and were not void, and did not constitute voidable preferences within the intent and meaning of Section 60B of the National Bankruptcy Act of 1898 and the amendments thereto.

[fol. 93] 2. That the defendant Morris Schoenthal is entitled to judgment against the plaintiff dismissing the complaint together with costs and disbursements of the action.

3. That defendant Fannie R. Schoenthal is entitled to judgment against plaintiff dismissing the complaint on the

merits, together with the costs and disbursements of the action.

Dated New York, March 2nd, 1931.
Respectfully submitted.
Martin Perlmutter, Solicitor for Defendants Morris Schoenthal and Fannie R. Schoenthal, 305 Broadway, Manhattan Borough, N. Y. C.

Denied. J. F. S.

[fol. 94] In United States District Court

[Title omitted]

Assignments of Error—March 18, 1931

Come now the said Morris Schoenthal and Fannie R. Schoenthal, appellants in the above entitled cause, and file the following assignment of errors:

1. The Court erred in denying the motion of said appellants for an order transferring the within cause from the equity to the law side of the Court.

2. The Court erred in denying the motion of the appellants for a trial by jury.

3. The Court erred in refusing the application by the appellant Fannie R. Schoenthal for an adjournment of the trial of the above entitled action.

[fol. 95] 4. The Court erred in denying the motion to sever the actions against the defendants-appellants, and for a separate trial of each action.

5. The Court erred in admitting into evidence on behalf of the appellee over the objection and exception of the appellants the schedules in bankruptcy of Leonard H. Smith, trading as Faultless Sweater Mills.

6. The Court erred in admitting in evidence on behalf of the appellee the following evidence:

(a) Check made by the bankrupt to the order of Blum Blockman & Co. in the sum of $100.00, marked Plaintiff's Exhibit 5.

(b) Check made by bankrupt dated June 24th, 1930, in the sum of $300.00 to the order of Hyman Smith, marked Plaintiff's Exhibit 9.

(c) Memorandum showing check in the sum of $500.00 made by bankrupt to Hyman Smith, marked Plaintiff's Exhibit 10.

7. The Court erred in permitting counsel for the appellee to examine witness L. H. Smith in the following manner over the objection and exception of the appellants:

"Q. Did you or did you not testify as follows before the Referee?

(Counsel for the appellee thereupon quoted at length from an unproved transcript of testimony claimed to have been taken before the Referee in bankruptcy.)

Q. Was that your testimony (referring to the quotation)?

A. Well, some of it is and some of it not."

[fol. 96] 8. The Court erred in denying the motion made by counsel for the appellants at the close of the appellee's evidence to dismiss the complaint on the ground that equity had no jurisdiction, and on the ground that the appellee failed to prove a cause of action as set forth in the bill of complaint.

9. The Court erred in denying the motion made by counsel for the appellants at the close of the entire case to dismiss the complaint and to direct judgment for the appellants.

10. The Court erred in denying the motion made at the close of the case for the adjournment of the action on behalf of the appellant Fannie R. Schoenthal.

11. The Court erred in making the following findings of fact of its decision, to wit: Nos. 5, 6 and 7.

12. The Court erred in making the following conclusions of law of its decision, to wit: Nos. 1, 2, 3 and 4.

13. The Court erred in refusing to find the proposed findings of fact of the appellants Nos. I, II, III, IV and V.

14. The Court erred in refusing to find appellant's conclusions of law marked 1, 2 and 3.

15. The Court erred in granting judgment in favor of the appellee and against the appellants, on the ground that the said judgment was erroneous both on the law and on [fol. 97] the facts, and on the ground that there is no evidence to support the said judgment and the findings made by the Court, and on the ground that the conclusions of law found by the Court were not supported either in law or in fact.

Wherefore appellants pray that the said judgment may be reversed and judgment granted in favor of appellants and against the appellee, dismissing the complaint on the merits, or in the alternative, granting appellants a new trial, together with the costs and disbursements of the action, and for such other and further relief as may to the Honorable Court be just and proper.

Dated New York, March 18th, 1931.

Martin Perlmutter, Attorney and Solicitor for Appellants, 305 Broadway, New York City.

[fol. 98] IN UNITED STATES DISTRICT COURT

ORDER AS TO RECORD—Filed May 18, 1931.

Upon the annexed stipulation dated the 28th day of April, 1931, and

Now, on motion of Martin Perlmutter, attorney for the defendants in the above entitled action, it is

Ordered, that in the appeal now pending in this action to the Circuit Court of Appeals for the Second Circuit, the provisions of Equity Rule 75, in so far as they relate to the reduction of the testimony of witnesses to narrative form, be waived and dispensed with, and that the evidence be printed in full in the record on appeal.

J. M. W., U. S. D. J.

[fol. 99] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated by and between the attorneys for the respective parties hereto, that in the appeal now pending to the Circuit Court of Appeals, in this action, the provisions of Equity Rule 75, in so far as they relate to the

reduction of the testimony of witnesses to narrative form, shall be waived, and the evidence printed in full in the record on appeal.

Dated New York, July —, 1931.

Krause & Hirsch, Attorneys for Plaintiff. Martin Perlmutter, Attorney for Defendants.

[fol. 100] Citation, in usual form, omitted in printing.

[fol. 101] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated New York, July —, 1931.

Martin Perlmutter, Attorney for the Appellant.
Krause & Hirsch, Attorneys for the Appellee.

[fol. 102] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 103] In United States Circuit Court of Appeals for the Second Circuit

Irving Trust Company, as Trustee in Bankruptcy of Leonard H. Smith, Trading as Faultless Sweater Mills, Bankrupt, Plaintiff-Appellee,

against

Morris Schoenthal and Fannie R. Schoenthal, Defendants-Appellants; Hyman Smith, Defendant

Appeal from a Judgment in Favor of the Trustee in the District Court for the Southern District of New York

Before Manton, Learned Hand, and Chase, Circuit Judges

Krause & Hirsch, Esqs., Attorneys for Appellee; George C. Levin, Esq., of Counsel.

Martin Perlmutter, Esq., Attorney for Appellants; Leo Guzik, Esq., Martin Perlmutter, Esq., of Counsel.

OPINION—Filed Jan. 4, 1932

Per CURIAM:

Judgment affirmed.

[fol. 104] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

IRVING TRUST CO., as Trustee, etc., Plaintiff-Appellee

vs.

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL, Defendants-Appellants; Hyman Smith, Defendant

Appeal from the District Court of the United States for the Southern District of New York

DECREE—Filed Jan. 11, 1932

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed, with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 105] [File endorsement omitted.]

[fol. 106] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 108] [File endorsement omitted.]

Endorsed on cover: File No. 36,581. U. S. Circuit Court of Appeals, Second Circuit. Term No. 14. Morris Schoenthal and Fannie R. Schoenthal, petitioners, vs. Irving Trust Co., as trustee in bankruptcy of Leonard H. Smith, etc. Petition for a writ of certiorari and exhibit thereto. Filed March 5, 1932. File No. 36,581.